Penn State Journal of Law & International Affairs

Volume 4
Issue 1 *Seventeenth Biennial Meeting of the International Academy of Commercial and Consumer Law*

December 2015

One More Brick in the Wall: The Impact of Personal Jurisdiction of Ex Juris Defendants on the Relationship Between the United States and Canada

Matthew Johnson

ISSN: 2168-7951

Recommended Citation

Matthew Johnson, *One More Brick in the Wall: The Impact of Personal Jurisdiction of Ex Juris Defendants on the Relationship Between the United States and Canada*, 4 Penn. St. J.L. & Int'l Aff. 522 (2015).
Available at: http://elibrary.law.psu.edu/jlia/vol4/iss1/23

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State
Journal of Law & International Affairs

2015 VOLUME 4 NO. 1

ONE MORE BRICK IN THE WALL: THE IMPACT OF PERSONAL JURISDICTION OF *EX JURIS* DEFENDANTS ON THE RELATIONSHIP BETWEEN THE UNITED STATES AND CANADA

Matthew Johnson

"When I have been in Canada, I have never heard a Canadian refer to an American as a "foreigner." He is just an "American." And, in the same way, in the United States, Canadians are not "foreigners," they are "Canadians." That simple little distinction illustrates to me better than anything else the relationship between our two countries."[1]

INTRODUCTION

The United States and Canada have a lengthy and historical development of their common law and statutory standards for obtaining personal jurisdiction of *ex juris* defendants in civil litigation.[2] The United States' doctrine has been developing since the mid-nineteenth century.[3] Canada, however, followed a rigid common law

---

[1] Sarah Lipkis, *United States of Canada*, WORLD POLICY BLOG (Oct. 22, 2013, 10:18 AM), http://www.worldpolicy.org/blog/2013/10/22/united-states-canada(quoting Franklin Delano Roosevelt).

[2] *See generally* Pennoyer v. Neff, 95 U.S. 714 (1878) (stating the proposition that *in personam* jurisdiction cannot be had over an absent defendant, but *in rem* jurisdiction can be had over the absent defendant's property); *see also* Moran v. Pyle Nat'l (Can.) Ltd., [1975] 1 S.C.R. 393 (discussing *in personam* jurisdiction in tort cases over a foreign defendant).

[3] *See, e.g.*, *Pennoyer*, 95 U.S. at 727, 731; *see also* J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (holding a court may not exercise jurisdiction over a defendant that has not purposefully availed itself to doing business within the jurisdiction).

system until the end of the twentieth century.[4] Since 1990, there have been five important cases altering the current Canadian doctrine on personal jurisdiction of *ex juris* defendants.[5] Most recently, the 2012 decision of *Club Resorts Ltd. v. Van Breda* marked a notable shift from its predecessor, *Muscutt v. Courcelles*.[6]

Today, the United States' greatest ally and biggest trading partner is Canada.[7] As China continues to establish itself as a global economic power, retaining close ties is important for both nations.[8] Though executives, legislatures, and judiciaries exercise comity[9] between nations,[10] the judiciary has the ability to influence and control the other branches' exercise of comity through its decisions and interpretations.[11] Because of this significant judicial power, this

---

[4] Muscutt v. Courcelles, 2002 CanLII 44957 (ON CA).

[5] *Id.* ¶ 14-17 (citing Tolofson v. Jensen [1994] 3 S.C.R. 1022; Amchem Prod. Inc. v. B.C. (Workers' Comp. Bd.), [1993] 1 S.C.R. 897; Hunt v. T&N plc., [1993] 4 S.C.R. 289; Morguard Inv. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077).

[6] Tanya J. Monestier, *(Still) A "Real and Substantial" Mess: The Law of Jurisdiction in Canada*, 36 FORDHAM INT'L L.J. 396, 402 (2013).

[7] *See U.S. Relations with Canada*, U.S. DEPT. OF STATE (Aug. 23, 2013), www.state.gov/r/pa/ei/bgn/2089.htm (noting the U.S. and Canada trade $1.6 billion worth of goods, daily, and three hundred thousand people cross their shared border, daily); *see also*, Doug Lamborn, U.S. Rep. from Colorado, *Building Keystone Pipeline will Cement U.S.-Canadian Relations*, THE HILL (Mar. 6, 2013), http://thehill.com/opinion/op-ed/286669-building-keystone-pipeline-will-cement-us-canada-relations (describing Canada as the United States' most important trading partner, sharing "close ties in culture, language and values").

[8] *See* Lipkis, *supra* note 1 (discussing the potential benefits of the United States and Canada forming an E.U.-like relationship to combat the efficiency of China's form of capitalism); *When Giants Slow Down*, ECONOMIST (July 27, 2013), http://www.economist.com/news/briefing/21582257-most-dramatic-and-disruptive-period-emerging-market-growth-world-has-ever-seen (discussing the slowing but steadying growth of Brazil, Russia, India, and China).

[9] Comity is defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895).

[10] *See* Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (explaining legislatures practice "prescriptive comity" by limiting the reach of their laws when enacting them).

[11] *See* Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 14 (2010).

comment recognizes the important role courts play in maintaining and increasing comity between the United States and Canada.

This comment will argue that the *Van Breda* decision has moved Canadian courts closer to United States courts on the issue of personal jurisdiction over *ex juris* defendants, which in turn has created increased comity among the two nations. Part II of this comment will introduce the history of personal jurisdiction over *ex juris* defendants in the United States and Canada. Furthermore, Part II will briefly discuss comity and its international role. Part III analyzes the current state of jurisdiction in the United States and compares it with the new Canadian standard set forth in *Van Breda*. Through this comparison, this comment will explore the opportunity for increased comity between the two nations. Part IV proposes that the current positions of both nations regarding personal jurisdiction over *ex juris* defendants allows for greater comity between the two nations, increasing their economic partnership and individual international strength.

I. Historical Background of Personal Jurisdiction Over *Ex Juris* Defendants in the United States and Canada and the Role of International Comity

A. Personal Jurisdiction Over Ex Juris Defendants in the United States

The United States' modern day jurisdiction found its roots in *Pennoyer v. Neff*,[12] but has undergone substantial change, culminating in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[13]

1. Pennoyer to International Shoe. — In Pennoyer v. Neff, the United States Supreme Court determined due process does not give a state the authority to assert in personam jurisdiction over an out-of-state defendant who does not personally assent to jurisdiction.[14] In reaching this determination, the Court focused on two "principles of

---

[12] *Pennoyer*, 95 U.S. at 730.

[13] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); *see generally* Michael H. Hoffheimer, *General Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 KAN. L. REV. 549 (2012) (discussing the evolution of Supreme Court rulings on personal jurisdiction).

[14] *Pennoyer*, 95 U.S. at 730 (citing D'Arcy v. Ketchum, 52 U.S. 165 (1851)).

public law."[15] First, every state has jurisdiction over persons and property within its jurisdiction. Second, a state does not have jurisdiction over persons or property beyond its jurisdiction.[16]

Relying on previous state and federal court decisions, however, the *Pennoyer* Court reiterated that a plaintiff who is unable to subject a foreign defendant to *in personam* jurisdiction may attach a defendant's property within the court's jurisdiction to hail the defendant into court.[17] But, if the defendant fails to appear, any judgment may "only bind [the defendant] to the extent of such property."[18] The Court noted the burdens a state may impose upon foreign persons.[19]

In the courtroom, *Pennoyer v. Neff* has essentially become irrelevant.[20] As legal scholar Michael Hoffheimer states, "[i]t is late in the day to argue . . . Pennoyer."[21] However, the court's reasoning is still relevant to understanding and discussing the connection between due process and personal jurisdiction.[22] With increasing global complexity, the United States Supreme Court found itself needing to shift toward a new doctrine, which could better adjudicate the increased mobility of citizens between different states.[23]

Nearly five decades after *Pennoyer v. Neff* was handed down, the Supreme Court, in an attempt to expand the reach of *Pennoyer*,[24] actually began to subtly shift away from its precedent.[25] The Court in *Hess v.*

---

15 *Id.* at 722.

16 *Id.* (citing Story, J., Confl. Laws, sect. 539) (emphasis added).

17 *Id.* at 724-25 (citing Cooper v. Reynolds 77 U.S. (10 Wall.) 308 (1870); Picquet v. Swan, 5 Mas. 35 (1828)).

18 *Pennoyer*, 95 U.S. at 724 (citing *Picquet*, 5 Mas. 35).

19 *Id.* at 734-35 (conditions for marriage/divorce, requiring foreign persons to appoint an agent to receive service of process when entering into a partnership within the state, and conditions for enforcing obligations against corporate officers other than personal service).

20 *See* Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1007 (2012).

21 Hoffheimer, *supra* note 13, at 554.

22 *Id.* at 554-55.

23 *See* Andrews, *supra* note 20, at 1003.

24 *Id.*

25 *See* Hess v. Pawloski, 274 U.S. 352, 356-57 (1927) (asserting the power of a state to exclude a non-resident confers upon the state a power to imply appointment of an agent through use of state highways, rendering physical presence

Pawloski allowed the state of Massachusetts to serve an out-of-state defendant, who was involved in an accident, pursuant to a Massachusetts statute.[26] The statute stated that in using Massachusetts' highways, a driver appoints the registrar as his agent for service of process.[27] Thus, once a driver enters Massachusetts, he impliedly consents that a state official may act as his agent, thereby making it possible for the state to obtain jurisdiction over him in the event he is involved in an accident or collision within the State's borders.[28] Despite citing numerous authorities,[29] all of which appeared to direct the court toward a strict *Pennoyer* ruling, the Court opted to base its decision on public policy reasons.[30] By using this type of analysis, as well as relevant case law,[31] the Court determined that whether the appointment of a state officer is formal or implied is "not substantial" so far as the Fourteenth Amendment is concerned.[32] Thus, by allowing an implied appointment of an agent by non-resident drivers, the Court had a manner in which it could obtain jurisdiction over the non-resident driver, and despite not having attachable property it could enforce a judgment as *Pennoyer* would allow.

While *Hess* helps illustrate the difficulties courts faced in applying *Pennoyer* to modern America, it did not address the difficulties associated with determining jurisdiction over corporations.[33] Courts formulated different rules to define when a state could and could not claim jurisdiction over a corporation doing business within its boundaries.[34] The Supreme Court tried to settle the split in 1945 and

---

in the territory unnecessary for service); *see also* Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729 (2012) (noting the court shifted the analysis from whether Massachusetts lacked authority to serve the defendant, rendering any judgment as contrary to the Due Process Clause, to whether enactment of the statute violated the Due Process Clause).

26 90 Gen. Laws Mass. *as amended by* Stat. 1923, c. 431, § 2.

27 *See Hess*, 274 U.S. at 356-57.

28 *Id.* at 356-57.

29 *See id.* at 355 (citing e.g. Flexner v. Farson, 248 U.S. 289 (1918); Goldey v. Morning News, 156 U.S. 518 (1894); *Pennoyer*, 95 U.S. 714).

30 *See Hess*, 274 U.S. at 356.

31 *See id.* at 356 (quoting Kane v. New Jersey, 242 U.S. 160, 167 (1916)).

32 *Hess*, 274 U.S. at 357.

33 *See* Andrews, *supra* note 20, at 1007.

34 *Id.*

provide a universal standard in determining jurisdiction over corporations.[35]

2. International Shoe. — In International Shoe Company v. Washington, the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment embodies substantive criteria for deciding personal jurisdiction issues.[36] Criticism has been levied against the Court, however, for its vagueness in defining what general jurisdiction entails.[37]

International Shoe Company was a St. Louis-based company, which sent sample shoes to approximately eleven agents located in the state of Washington *et alibi*.[38] Washington wanted to collect employment taxes, which were due from International Shoe.[39] Notice was served to International Shoe's agent in Washington and by certified mail to its home office.[40] International Shoe argued that its activities in Washington were not "sufficient to manifest its 'presence,'" and thus, the state of Washington violated its due process rights in subjecting it to suit.[41]

In his majority opinion, Chief Justice Stone analyzed *Pennoyer*-era decisions[42] and determined that the satisfaction of due process in personal jurisdiction "depend[s] rather upon the quality and nature of the activity . . . ."[43] Based on this principle, Chief Justice Stone announced what is known as the "minimum contacts" doctrine.[44] As stated by Chief Justice Stone, "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present

---

35 *See* Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945).

36 Perdue, *supra* note 25, at 733.

37 *See Int'l Shoe*, 326 U.S. 310 (Black, J., concurring); Hoffheimer, *supra* note 13; Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998); Perdue, *supra* note 25 at 734-35.

38 *Int'l Shoe*, 326 U.S. at 313.

39 *Id.* at 312-13. The commissions received by the salespersons were in excess of $31,000.

40 *Id.*

41 *Int'l Shoe*, 326 U.S. at 315.

42 Andrews, *supra* note 20, at 1008.

43 *Int'l Shoe*, 326 U.S. at 319.

44 *Id.* at 316.

within the territory of the forum, he have certain minimum contacts with it. . . ."[45] Chief Justice Stone continued to rule that, "the maintenance of the suit [can]not offend 'traditional notions of fair play and substantial justice.'"[46]

Chief Justice Stone's "minimum contacts" doctrine provides no real guidance on how courts are to determine a corporation's presence within a certain jurisdiction.[47] To better substantiate its new standard, the Court returned to the *Pennoyer* era and sorted cases into one of four categories.[48] The categories assist in determining whether a corporation has sufficient minimum contacts with a forum state to allow jurisdiction.[49] Chief Justice Stone asserts that those cases involving continuous and systematic activities related to the claim at bar, and cases involving isolated incidents not related to the claim at bar are obvious cases in which jurisdiction could be conferred and not conferred, respectively.[50] Conversely, those cases involving continuous activities not related to the claims at bar or single occasional acts by a corporate agent make the jurisdictional determination more difficult.[51]

The "minimum contacts" doctrine has served as an expansion of the basic principles set forth in *Pennoyer v. Neff* and its progeny.[52] The new test serves as a policy-based and flexible analytical approach,

---

45 *Id.*; *but see*, *id.* at 322 (Black, J., concurring) (the Court went too far by announcing its new due process rule).

46 *Int'l Shoe*, 326 U.S. at 316 (quoting Miliken v. Meyer, 311 U.S. 457, 463 (1940); *see also* McDonald v. Mabee, 243 U.S. 90, 91(1917)).

47 *See* Hoffheimer, *supra* note 13, at 561 ("the court's new 'minimum contacts' requirement added little more than the appropriate label when a court decided that a case satisfied constitutional requirements."); *See also* Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 761 (2003) (criticizing the minimum contacts test).

48 *See* Hoffheimer, *supra* note 13, at 558-61 (describing the four categories as cases involving: (1) a corporation's continuous and systematic contacts within a state; (2) the casual presence of a corporate agent, or an isolated incident unrelated to the claims at bar; (3) continuous and systematic contacts distinct from the causes of action; and (4) single occasional acts by an agent in the state).

49 *See id.*

50 *Int'l Shoe*, 326 U.S. at 317.

51 *Id.* at 318.

52 Hoffheimer, *supra* note 13, at 561.

taking into consideration concerns like fairness, to both states and corporations.[53]

3. Onward Ho!: Development of the "Minimum Contacts" Doctrine. — Since the ruling of the "minimum contacts" doctrine in International Shoe Co. v. Washington, the United States Supreme Court has proceeded to split personal jurisdiction into two categories. These categories are 1) specific, "case-linked" jurisdiction, and 2) general jurisdiction.[54]

The specific, case-linked category of cases has been bifurcated to examine, first, the minimum contacts of a corporation within the forum, and second, the fairness of hailing the corporation into such forum.[55] Furthermore, the Court has continued to apply this analysis to the realm of products liability cases, adopting a "stream of commerce" doctrine.[56]

The second category, general jurisdiction, involves the two categories of cases proffered in *International Shoe* in which personal jurisdiction determinations are obvious.[57] The following subsections will discuss each of the categories with more detail.[58]

a. Stream of commerce and fairness. – In World Wide Volkswagen Corp. v. Woodson, the Supreme Court set forth a "stream

---

53 *See Int'l Shoe*, 326 U.S. 310; *see also* Hoffheimer, *supra* note 13, at 561; McFarland, *supra* note 47, at 761; McMunigal, *supra* note 37, at 195-96.

54 Taylor Simpson-Wood, *In the Aftermath of Goodyear Dunlop: Oyez! Oyez! Oyez! A Call for a Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 116 (2012).

55 *Id.* at 117.

56 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

57 *See Int'l Shoe*, 326 U.S. at 317 (cases involving continuous and systematic activities related to the claim at bar are cases in which jurisdiction could obviously be conferred, while cases of isolated incidents not related to the claim at bar are situations in which jurisdiction could obviously not be conferred); *see also* Simpson-Wood, *supra* note 54, at 118 (describing these cases as those in which "a foreign defendant's contacts with the forum do not relate to the cause of action, but are "so 'continuous and systematic' as to render them essentially at home in the forum state") (citing Goodyear Dunlop Tires Operations, S.A., 131 S. Ct. at 2851 (quoting *Int'l Shoe*, 326 U.S. at 317)).

58 The "minimum contacts" portion of category one will not be discussed, as it was expounded upon in the previous section.

of commerce" standard by determining whether a corporation "purposefully availed" itself to the forum.[59] The Court based this doctrine on fairness.[60] In doing so, the Court listed five factors to be considered in determining whether it is fair to hail a defendant into court in a particular forum: (1) the defendant must have a relationship with the forum which would make it "reasonable . . . to require the corporation to defend the particular suit which is brought there," (2) the interest of the forum state in adjudicating the dispute, (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) the interest of the entire interstate judicial system in the most efficient resolution of controversies, and (5) the interest of States in "furthering fundamental substantive social policies."[61]

World Wide Volkswagen involved New York residents who were injured when their car, purchased in New York, exploded in Oklahoma.[62] The plaintiffs brought suit against the vehicle's regional distributor, World-Wide Volkswagen, and its retail dealer, Seaway, *inter alia*.[63] Seaway only sold cars in Massena, New York, and World-Wide's market only extended to New York, New Jersey, and Connecticut.[64]

In determining the defendants could not be brought into court in Oklahoma, the Court founded its reasoning in fairness.[65] It did so through a two-prong approach based in the Due Process Clause of the Fourteenth Amendment.[66]

---

59 *See World-Wide Volkswagen*, 444 U.S. at 297-98; *See also* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 441 (1961) (that stream of commerce was originally espoused in this case).

60 *See World-Wide Volkswagen*, 444 U.S. at 292.

61 *Id.*

62 *Id.* at 288.

63 *See id.* (The plaintiffs argued that it was foreseeable that cars sold by World-Wide and Seaway would travel to Oklahoma. From this the plaintiffs asserted World-Wide and Seaway had minimum contacts necessary to attain personal jurisdiction).

64 *See id.* at 298.

65 *See World-Wide Volkswagen*, 44 U.S. at 294.

66 *See id.* at 292, 297-99; *see also* Andrews, *supra* note 20, at 1010-11.

Professor Carol Andrews[67] explains that the first prong ensures protection to foreign defendants by limiting the ability of states to exceed their jurisdiction as "coequal sovereigns in a federal system."[68] This is evident when Justice White writes, "[we] stress[] that the Due Process clause ensures not only fairness, but also the 'orderly administration of the laws.'"[69]

The second prong protects the defendant from litigating in an inconvenient forum by examining facts within the five factors listed by the court.[70] In applying the second prong, Justice White notes that fairness under the Due Process Clause does not turn on a defendant's ability to foresee that its product may end up in a specific forum.[71] Rather, a defendant's "conduct and connection with the forum state" must be "such that . . . [through its] purposeful[] avail[ment] . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation."[72]

Professor Wendy Perdue[73] has argued that the *World Wide Volkswagen* Court's interpretation of the Due Process Clause shifted the Clause away from a procedural jurisdiction safeguard to a substantive "defendant-focused approach."[74] This criticism certainly carries some merit, as Justice White writes that even when fairness is not lacking, the Due Process Clause may "divest the State of its power to render a valid judgment."[75] Regardless of Professor Perdue's, and other scholars', critical view of the Court's reasoning in *World Wide Volkswagen*, gaining *in personam* jurisdiction over a foreign defendant

---

67 Douglas Arant Professor of Law, University of Alabama School of Law.

68 *See* Andrews, *supra* note 20, at 1010 (quoting *World-Wide Volkswagen*, 44 U.S. at 292).

69 *World-Wide Volkswagen*, 44 U.S. at 293-94 (quoting *Int'l Shoe*, 326 U.S. at 319).

70 *See* Andrews, *supra* note 20, at 1010-11.

71 *See World-Wide Volkswagen*, 44 U.S. at 297.

72 *Id.*

73 Dean, University of Richmond School of Law.

74 *See* Perdue, *supra* note 25, at 733-34 (commenting that the Court incorrectly restates the holding from *Pennoyer v. Neff* allowing it to shift the Due Process Clause from a mechanism for a procedural challenge of jurisdiction to a substantive standard by which to assess a jurisdictional challenge).

75 *World-Wide Volkswagen*, 44 U.S. at 294.

requires a fairness examination under the Due Process Clause.[76] However, prior to the fairness examination, the defendant had to purposefully avail himself to that jurisdiction by introducing his product into that jurisdiction's stream of commerce; the mere possibility of the product entering the foreign jurisdiction was not enough.[77]

Later cases have followed the fairness standard established in *World-Wide Volkswagen*.[78] In *Keeton v. Hustler Magazine Inc.*, the plaintiff sought jurisdiction in New Hampshire to bring suit against Hustler Magazine.[79] In holding that New Hampshire had jurisdiction to hear the plaintiff's claim, the Supreme Court reasoned Hustler Magazine had sufficient minimum contacts in New Hampshire[80] such that it was fair to compel the magazine to face suit in New Hampshire.[81] Beyond the extent of Hustler's sales in New Hampshire, the Court based its reasoning of fairness on the second *World Wide Volkswagen* factor, stating that New Hampshire had a strong interest in holding Hustler accountable for libel committed within its jurisdiction.[82] This interest is created because Hustler's libel of Keeton harms both Keeton and New Hampshire's own citizens who read Hustler's publication.[83]

Burger King Corp. v. Rudzewicz[84] made a very subtle but important change to the original two-prong standard established in *World-Wide*

---

[76] *See id.* at 294-95.

[77] *See id.* at 297-98.

[78] *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); *see also* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

[79] Plaintiff Keeton assisted in the production of Hustler Magazine. Her name appears in several places on the magazines. Hustler sold approximately 10,000-15,000 copies of Hustler Magazine in New Hampshire. Plaintiff sued Hustler, claiming Hustler libeled her in five separate issues of its magazine. Keeton brought suit in New Hampshire, claiming New Hampshire could exert personal jurisdiction over Hustler. Neither plaintiff nor defendant was a resident of New Hampshire. *Keeton*, 465 U.S. at 772.

[80] *See id.* (Hustler sold approximately 10,000 to 15,000 copies of its magazines each month in New Hampshire.).

[81] *Id.* at 781.

[82] *See Keeton*, 465 U.S. at 775-76.

[83] *See id.*

[84] Defendants Rudzewicz and MacShara entered into a franchising agreement with Burger King Corp. Burger King was headquartered in Miami,

Volkswagen.[85] Above the surface, the Court's holding was quite simple and aligned with its predecessors.[86] According to the Court, the contract between Rudzewicz and Burger King created a "continuing obligation" between himself and Burger King, a resident of Florida, thereby availing himself of the "privilege of conducting business there . . . [and being] shielded by [Florida's] laws."[87] Thus, it was foreseeable that he may be brought into court in Florida.[88]

Below the surface, however, Justice Brennan attempted to shift the Court away from a strong defendant-centered minimum contacts test by redefining the burden of proof required to defeat personal jurisdiction.[89] Brennan made clear that, once the plaintiff has proven the existence of a contact, the defendant has what Professor Richard Freer[90] calls a "strikingly onerous burden."[91] That burden requires the defendant to present a "compelling case" showing jurisdiction to be "so gravely difficult and inconvenient [he] . . . is at a severe disadvantage in comparison to his opponent."[92] As a result of the increased burden on the defendant, much of the Court's discussion in subsequent cases has focused on the contacts of a defendant with a forum more than the fairness of hailing a defendant into a particular forum.[93]

Florida, but had a regional office in Michigan. The franchising agreement required payments over a twenty-year period, which would total more than one million dollars. Defendants fell behind on payments to Burger King and subsequently entered into negotiations with Burger King's Michigan and Florida offices to settle payment issues. After negotiations broke down, Burger King filed suit in Florida. *Burger King*, 471 U.S. at 464-68.

85 *See* Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 570-72 (2012).

86 *See Burger King*, 471 U.S. at 462 (a Michigan defendant had contracted with a Florida corporation, which, according to the court, fairly availed him to Florida's jurisdiction since the contract had an abundance of requirements, all having a connection with Florida).

87 *Id.* at 476.

88 *Id.* at 474.

89 *See* Freer, *supra* note 85, at 571-72.

90 Robert Howell Hall Professor of Law, Emory University School of Law.

91 *Id.* at 572.

92 *Burger King*, 471 U.S. at 477-78 (quoting Bremen v. Zapata-Off Shore Co., 407 U.S. 1, 18 (1972)).

93 *See* Freer, *supra* note 85, at 574-76, 581, 589.

Interestingly, despite the increased burden of proof on the defendant, two years later, in *Asahi Metal Indus. Co. v. Superior Court of Cal.*,[94] the Court used the fairness standard to find that Asahi could not be brought into court in California.[95] Justice O'Connor and three other justices determined that, in addition to jurisdiction being unfair, California lacked sufficient contacts with Asahi.[96] The Court reasoned that "[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*."[97] Simple awareness by a defendant that its product will be swept into a particular forum through a stream of commerce does not amount to purposefully directing its product toward that state by placing the product within such stream.[98]

Post-*Asahi*, to gain specific personal jurisdiction over a defendant, a forum must survive a two-prong approach.[99] First, it must prove minimum contacts between the defendant and the forum.[100] In the case of a corporation the Court will look to whether or not the defendant purposefully placed its product in the stream of commerce.[101] Second, it must prove that it is fair to hail the defendant into the forum.[102] With the post-*Burger King* increased burden of proof upon the defendant to rebut jurisdiction by arguing the forum is unfair,

---

94 Plaintiff was a California citizen whose wife died in a motorcycle crash after one of the tires blew out. Plaintiff brought suit against Cheng Shin Rubber Industrial Co., Ltd. Cheng Shin sought indemnification from Asahi Metal Indus. Co. Cheng Shin bought parts from Asahi and incorporated those parts in tires it sold. Cheng Shin did approximately twenty percent of its business in the United States. Asahi has no offices, property, or agents in California. Its offices were located in Japan. *Asahi*, 480 U.S. 102.

95 *See Asahi*, 480 U.S. at 114; *see also Burger King*, 471 U.S. at 576 (*Asahi* is the only case in which fairness was used to reject jurisdiction).

96 Freer, *supra* note 85, at 574-75.

97 *Asahi*, 480 U.S. at 112.

98 *Id.*

99 *See* Freer, *supra* note 85, at 552-53; *see also* Andrews, *supra* note 20, at 1010-11.

100 *See Int'l Shoe*, 326 U.S. 310.

101 *See World-Wide Volkswagen*, 444 U.S. at 297-98.

102 *See id.*

defendants' best chance of overcoming jurisdiction is proving a lack of contacts, and the case law has reflected this shift towards contacts.[103]

b. Goodyear v. Brown: A look at general jurisdiction. – As discussed earlier, Chief Justice Stone in International Shoe classified two categories of cases: those in which the alleged acts are tied directly to the contacts of the defendant and those in which the alleged acts are not tied to the contacts of the defendant.[104] Professor Carol Andrews has termed cases: in which the alleged acts are tied directly to the defendant's "continuous and systematic" contacts as "easy yes" cases; in which the defendant had "isolated" contacts with the forum or the alleged acts are not tied to those contacts as "easy no" cases; in which the defendant's contacts were extensive but the alleged acts were unrelated or instances where the defendant's contacts were "isolated" but the alleged act was tied to those contacts as "maybe" cases.[105]

Andrews further notes that the "easy yes" cases and the "maybe" cases involving isolated but related contacts have been termed by the court as specific jurisdiction.[106] Those cases were discussed above. This subsection seeks to inform the reader as to the Court's position on the "easy no" and continuous but unrelated contacts cases, now termed general personal jurisdiction.[107]

The most recent case involving general personal jurisdiction is *Goodyear Dunlop Tire Operations v. Brown*.[108] The defendant contested jurisdiction in North Carolina as improper.[109] The defendants had no connections to North Carolina outside of their parent company and a small fraction of tires they sold in North Carolina, typically custom ordered for specific vehicles.[110] According to the Court, the "paradigm forum for the exercise of general jurisdiction . . . for a corporation

---

103 *See* Freer, *supra* note 85, at 589.

104 *See Int'l Shoe*, 326 U.S. at 317-18; *see also* Hoffheimer, *supra* note 13.

105 *See* Andrews, *supra* note 20, at 1008-09.

106 *Id.* at 1009.

107 *See id.* at 1009-10.

108 *Goodyear*, 131 S. Ct. at 2848 (subsidiaries of Goodyear U.S.A. were sued by the parents of children killed when a bus, using tires manufactured by the subsidiaries, rolled over near Paris, France).

109 *Id.* at 2852.

110 *Id.*

[is] . . . one in which [it] is fairly regarded as at home."[111] Hoffheimer states that the Court understands "at home" as relating to the defendant's state of incorporation, its principal place of business, and potentially anywhere in which it has "substantial, continuous, and systematic activity."[112] Using the paradigmatic forum analysis, the Court determined that the defendant subsidiaries' connections to North Carolina "fall far short of the 'continuous and systematic general business contacts' necessary" for jurisdiction over them on claims "unrelated to anything that connects them to the State."[113]

In reaching its conclusion, the Court contrasted the prior case of *Perkins v. Benguet Consol. Mining Co.*[114] Perkins involved a Philippine mining company which ceased its operations to Ohio during World War II.[115] The company's president maintained an office in Ohio and supervised its mining activities from the Ohio office.[116] The Court in *Perkins* found that, because Ohio was the principal place of business, even temporarily, general jurisdiction was proper in Ohio.[117]

The Court also compared another prior case, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[118] in which general jurisdiction in Texas was found improper when a Colombian helicopter operation company was sued in a wrongful death suit.[119] The defendant's only ties to Texas were: acceptance of checks drawn on a Houston bank account; helicopters, equipment, and training services purchased from a Texas corporation; and personnel training in Texas.[120] The *Helicopteros* Court concluded "'mere purchases [made in the forum State], even if occurring at regular intervals, are not enough [for general] jurisdiction

---

111 *Id.* at 2853-54.

112 *See* Hoffheimer, *supra* note 13, at 551.

113 *Goodyear*, 131 S. Ct. at 2857 (citing Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 416 (1984)).

114 *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

115 *Goodyear*, 131 S. Ct. at 2856.

116 *Perkins*, 342 U.S. at 447-48.

117 *See Goodyear*, 131 S. Ct. at 2856; *see also Perkins*, 342 U.S. 437.

118 *Helicopteros*, 466 U.S. 408.

119 *See id.* at 415-16.

120 *See Goodyear*, 131 S. Ct. at 2856 (quoting *Helicopteros*, 466 U.S. at 416).

over a non-resident corporation" when the purchase transactions are not related to the cause of action.[121]

The *Goodyear* Court leaned towards the reasoning of *Helicopteros*, indicating that the only way in which systematic activity within a forum will allow for general jurisdiction is if such activity takes place at extremely high volumes.[122]

After *Goodyear*, the state of general jurisdiction is not fully known.[123] It appears that the Court stripped general jurisdiction down to the point that it is only applicable in cases in which the corporation is, literally, "at home" in the forum.[124]

Thus, to obtain jurisdiction over an *ex juris* defendant in the United States, a forum must be able to obtain either specific jurisdiction, which is focused on minimum contacts and fairness, or general jurisdiction, which is focused on whether the defendant is "at home." The *Goodyear* court informed us that, since *International Shoe*, the Supreme Court has focused primarily on cases involving specific personal jurisdiction.[125] Nevertheless, general jurisdiction still exists as an option for plaintiffs who cannot obtain specific jurisdiction over a defendant.

Having surveyed the development of American jurisprudence on personal jurisdiction over *ex juris* defendants, we must proceed to survey such jurisprudence in Canada.

B. Personal Jurisdiction Over Ex Juris Defendants in Canada

Modern day personal jurisdiction in Canada is rooted in the English House of Lords, which developed a "real and substantial

---

121 *See id.* at 2856 (quoting *Helicopteros*, 466 U.S. at 418).

122 *See* Hoffheimer, *supra* note 13, at 592; *but see* Freer, *supra* note 85, at 587-88 (arguing that even high levels of sales activity is unlikely to justify general personal jurisdiction).

123 *See* Hoffheimer, *supra* note 13, at 551.

124 *See* Hoffheimer, *supra* note 13, at 551; *see also* Freer, *supra* note 85, at 585.

125 *See Goodyear*, 131 S. Ct. at 2854.

connection" test.[126] After *Indyka*, the real and substantial connection test was employed three more times before, in 1990, becoming "enshrined as a central jurisdictional principle" in *Morguard Investments Ltd. v. De Savoye*.[127]

In 1993, *Hunt v. T&N PLC.* made clear that the principles enunciated in *Morguard* were constitutionally founded.[128] Over the next nineteen years, the Supreme Court of Canada defined what a "real and substantial" connection was, culminating its efforts in its 2012 decision of *Club Resorts Ltd. v. Van Breda.*[129] This section will summarily track the Supreme Court of Canada's development of the real and substantial connection test from its roots in *Indyka* to its current state following *Van Breda*.

1. Early Development of the "Real and Substantial Connection" Doctrine. — The real and substantial connection doctrine originated in the English case *Indyka v. Indyka.*[130] Prior to *Indyka*, an English woman's ability to obtain a divorce was dependent upon a set of particular rules.[131] With the introduction of the real and substantial connection test, the previous rules were replaced by a general principle revolving around the strength of a person's connection with a particular forum.[132] The Supreme Court of Canada expanded the use of the real and substantial connection test, in *Moran v. Pyle National (Canada) Ltd.*, to torts.[133]

In *Moran*, the Supreme Court of Canada held it reasonable to find a real and substantial connection with a forum, thereby allowing that forum to have jurisdiction, if a defendant could reasonably foresee that its product would cause injury and be used and consumed in the

---

126 Joost Blom, Q.C. & Elizabeth Edinger, *Conflicts of Law: The Chimera of the Real and Substantial Connection Test*, 38 U.B.C L. REV. 373, 374-76 (2005)(stating that the English case *Indyka v. Indyka* established a more uniform system of divorce).

127 *Id.* at 377-78.

128 *Id.* at 378, 385.

129 *See generally*, Blom, *supra* note 126; Peter J. Pliszka, *My Place or Yours? SCC Sets New and Improved Test for Jurisdiction in Canada*, 80 DEF. COUNS. J. 273 (2013).

130 *See* Blom, *supra* note 126, at 375.

131 *Id.* at 375-76.

132 *Id.* at 376.

133 *See* Moran v. Pyle National (Can.) Ltd., [1975] 1 S.C.R. 393, 408-09; *see also* Blom, *supra* note 126, at 377.

foreign jurisdiction.[134] The Court's decision resembled its American counterpart's stream of commerce inquiry.[135] Like the Court in *World-Wide Volkswagen*, the *Moran* Court would require a strong enough relationship between the defendant and the forum to make it fair to require the defendant to litigate in the foreign forum.[136]

The *Moran* holding further compares with the American tort case of *Calder v. Jones*.[137] The United States Supreme Court held in *Calder* that California could assert jurisdiction over two Florida journalists, with essentially no contacts to California, because they wrote a libelous story about a California citizen with the knowledge and expectation that it would be widely circulated in California.[138] In both cases, the American and Canadian Supreme Courts showed they were willing to extend a stream of commerce-like analysis to tort cases.

Almost two decades after *Moran*, the Supreme Court of Canada once again relied on the real and substantial connection test.[139] In *Morguard v. De Savoye*, the Supreme Court of Canada addressed the issue of whether a judgment in one province could be recognized by another.[140] In determining that the Alberta judgment should be recognized in British Columbia, La Forest J. focused on balancing order and fairness.[141] Order, La Forest J. opined, dictates that a foreign provinces' judgment should be recognized across Canada for reasons

---

134 *Moran*, [1975] 1 S.C.R. (Can.) at 409.

135 *See Asahi*, 480 U.S. 102; *World-Wide Volkswagen*, 444 U.S. 286 (1980); *see also* Calder v. Jones, 465 U.S. 783 (1984).

136 *See World-Wide Volkswagen*, 444 U.S. at 292; *Moran*, [1975] 1 S.C.R. at (Can.) 409.

137 Calder, 465 U.S. 783.

138 *Id.* at 789-90.

139 Morguard Inv. Ltd. v. De Savoye, [1990] 3 S.C.R. (Can.) 1077; Blom, *supra* note 23, at 378; Monestier, *supra* note 6, at 180-81.

140 *Morguard*, [1990] 3 S.C.R. (Can.) at 1082. The Ontario Court of Appeal subsequently explained that, though *Morguard* explained the real and substantial connection test "from the perspective of recognition and enforcement, La Forest J. made it clear that precisely the same real and substantial connection test applies to the assumption of jurisdiction against an out-of-province defendant." Muscutt v. Courcelles, [2002] CanLII 44957, para. 38 (ON CA).

141 *Morguard*, [1990] 3 S.C.R. at 1102-03; *see also* Blom, *supra* note 126, at 381.

of comity.[142] La Forest J. compared this idea to the United States' full faith and credit clause.[143]

Fairness, La Forest J. determined, was more important than order.[144] While order provided ample reasoning to support judgment recognition across Canada, fairness was a necessity.[145] La Forest J. described fairness as the relationship between the jurisdiction's contacts and the defendant or subject matter of the suit.[146] Accordingly, the *Morguard* court acknowledges three grounds upon which a court can claim jurisdiction over a defendant: 1) the defendant is served *in personam*; 2) the defendant consents to jurisdiction through agreement or attornment;[147] and 3) there is a real and substantial connection between the defendant or cause of action and the forum.[148] Though *Morguard* focused on the recognition of interprovincial judgments, La Forest J. provides undertones throughout his opinion which seem to relate the expressed principles to the realm of private international law.[149]

---

142 *See Morguard*, [1990] 3 S.C.R. (Can.) at 1096-97.

143 *See id.* at 1100, 1102.

144 *See id.* at 1102-03; *see also* Blom, *supra* note 126, at 381 (arguing the *Morguard* decision sacrificed order for fairness).

145 *See Morguard*, [1990] 3 S.C.R. at 1103.

146 *Id.*

147 "Attornment occurs when a defendant, by his or her conduct consents or submits to a jurisdiction . . . without reserving its right to challenge the claimant's chosen jurisdiction at a later time." Melissa Kehrer & John A. Olah, *Trips, Traps and Jurisdiction Part 2*, CLAIMS CAN. (Feb. 2008), http://www.claimscanada.ca/issues/article.aspx?aid= 1000219849&er=NA; *see also* BLACK'S LAW DICTIONARY 147 (9th ed. 2009).

148 *Morguard*, [1990] 3 S.C.R. at 1103-04. For a hypothetical example of all three grounds, *see also* Stephen C. Nadler, *Navigating the Litigation Landscape in Canada: Securing Evidence and Enforcing Judgments*, BUS. LAW TODAY, Jan./Feb. 2008, at 42; *Cf.* Monestier, *supra* note 6, at n. 2 (noting *Beals v. Saldanha*, 2003 SCC 72, places the most importance on whether there is a real and substantial connection, while other indicia (presence and consent) bolster the real and substantial connection).

149 *See Morguard*, [1990] 3 S.C.R. at 1095 ("Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances"); *id.* at 1097 ("what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice"); *id.* at 1098 (noting that the United States and European countries have created more generous rules for recognition and enforcement of foreign judgments).

Shortly after *Morguard*, the Supreme Court of Canada, in *Hunt v. T & N plc.*,[150] reiterated the importance of order and fairness but chose not to further define the scope and application of the real and substantial connection test.[151] La Forest J. wrote that the real and substantial connection test was a flexible test which simply "captured the idea that there must be some limits on claims to jurisdiction."[152] The *Hunt* opinion details some prior applications of the real and substantial connection test, concluding that "no test can perhaps ever be rigidly applied . . . [and] the assumption of . . . jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections."[153]

The plaintiff in *Hunt*, a resident of British Columbia, alleged he was injured due to the tortious behavior of the defendants domiciled in Quebec.[154] The plaintiff brought action in British Columbia and sought production of various documents.[155] The defendants refused to produce the documents on the ground that they were not required to do so because they were protected by the Quebec *Business Concerns Records Act*.[156] On the basis of *Morguard*, the Supreme Court of Canada held that the Quebec Act was not applicable to the proceedings in British Columbia.[157]

The *Hunt* decision elevated the *Morguard* principles to constitutional status, indicating that they cannot be overridden by provincial courts.[158] The Court determined that the idea of Canadian

---

150 Hunt v. T & N plc., [1993] 4 S.C.R. 289.

151 Blom, *supra* note 126, at 385.

152 *Hunt*, [1993] 4 S.C.R. at 325.

153 *Id.* at 326; *cf. Calder*, 465 U.S. 783 (focusing on the fairness of California exercising jurisdiction despite a lack of contacts); *World-Wide Volkswagen*, 444 U.S. at 293-94 (stressing that the Due Process Clause ensures fairness and the orderly administration of the laws); Hanson v. Denckla, 357 U.S. 235, 250 (1958) (describing the evolution of American *in personam* jurisdiction from the rigid *Pennoyer v. Neff* to the more flexible *Int'l Shoe Co. v. Washington*).

154 *Hunt*, [1993] 4 S.C.R. at 297.

155 *Id.* at 298.

156 *Id.* at 298; *see generally* Robert Wisner, *Uniformity, Diversity, and Provincial Extraterritorality: Hunt v. T & N plc.*, 40 MCGILL L.J. 759, 762 (1995) (explaining the Quebec *Business Concerns Records Act* is a blocking statute, prohibiting the removal of business documents from the province for the purpose of litigation).

157 *See Hunt* [1993] 4 S.C.R. at 331-32.

158 *See id.* at 324; *see also* Blom, *supra* note 126, at 385.

provinces giving full faith and credit to the judgments of other provinces was a "constitutional imperative[]," and while provinces may enact legislation regarding the recognition of judgments of other provinces, *Morguard* established a minimum threshold for order and fairness which the provinces must respect.[159]

The international undertones of *Morguard* and its emphasis on the importance of order and fairness, subsequently echoed in *Hunt*, were expressed together in *McNichol Estate v. Woldnik*.[160] *McNichol Estate* involved a Florida chiropractor, Dr. Puentes, being sued in Ontario following the death of Louis McNichol, an Ontario resident who died in Florida.[161] Dr. Puentes was the only non-resident of Ontario named in the lawsuit.[162] Dr. Puentes argued to have the real and substantial connection test applied to him separately from the other defendants. The Ontario Court of Appeal refused to do so.[163]

Rationalizing why it chose not to apply the real and substantial test to Dr. Puentes separately, the Court argued to do so "would be a step backwards . . . away from the recognition of the increasingly complex and interdependent nature of the modern world community which lies at the heart of [*Morguard's* and *Hunt's*] reasoning."[164] Further, the Court wrote, "it would mute the influence of the underlying requirements of order and fairness."[165] The decision of the Court emphasizes that the order and fairness dictated by the real and substantial connection test extends beyond inter-provincial disputes to foreign disputes.

2. What is a real and substantial connection?: The modern real and substantial connection doctrine.- While the Canadian Supreme Court chose not to expand upon the real and substantial connection test in *Hunt*, the Ontario Court of Appeal did do so in *Muscutt v. Courcelles*.[166] The

---

159 *Hunt* [1993] 4 S.C.R. at 324.

160 McNichol v. Woldnik, [2001] CanLII 5679 (ON CA).

161 *Id.* at para. 1.

162 *Id.*

163 *Id.* at para. 12-15.

164 *McNichol*, 2001 CanLII at para. 12.

165 *Id.*

166 *See Muscutt*,(2002) CanLII. 44957. The Canadian Court system is similar to that of the United States. Provincial trial courts appeal to provincial courts of appeal, which appeal to the Supreme Court of Canada. Thus, just as American

Ontario court listed eight factors to consider when determining whether a forum can ascertain jurisdiction over a foreign defendant: the connection between the forum and the plaintiff's claim; the connection between the forum and the defendant; unfairness to the defendant in assuming jurisdiction; unfairness to the plaintiff in not assuming jurisdiction; the involvement of other parties to the suit; the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; whether the case is inter-provincial or international in nature; and comity and the standards of jurisdiction, recognition, and enforcement prevailing elsewhere.[167]

Legal Scholar Tonya Monestier notes that the Supreme Court of Canada never explicitly endorsed the *Muscutt* factors.[168] The Ontario Court of Appeal, following the rationale of the Supreme Court of Canada's opinion in *Morguard*, believed that fairness to both parties was important, and that the eight factors provided for fairness as well as flexibility, as *Morguard* discussed.[169] This led to the biggest criticism of the *Muscutt* factors: only the first two factors actually dealt with a connection of any sort between the forum and the claim or defendant.[170] Despite this criticism from scholars, the *Muscutt* factors were considered influential in other provinces.[171]

The eight factors were challenged in *Club Resorts Ltd. v. Van Breda*.[172] The Canadian Supreme Court found it necessary to more clearly articulate factors defining what a real and substantial connection

---

appellate courts can act in the absence of action by the Supreme Court, so can provincial appellate courts in Canada.

167 *Muscutt*, (2002) CanLII 44957 (Can.) at para. 75-104.

168 Monestier, *supra* note 6, at 183.

169 *See Muscutt*, (2002) CanLII 44957 at para. 72, 86-88; *see also* Monestier, *supra* note 6, at 193-94.

170 *See* Monestier, *supra* note 6, at 184 ("[The final six factors] are not strictly concerned with the connection of the forum to the parties and the cause of action.") (quoting Bastarache J., in *Castillo v. Castillo*, 2005 SCC 83, para. 45)); Stephen G.A. Pitel, *Reformulating a Real and Substantial Connection*, 60 U.N.B.L.J. 177, 182 (2010); *see also* Blom, *supra* note 123, at 394 ("Only the first two of the eight factors are strictly factual in nature").

171 Club Resorts Ltd. v. Van Breda, 2012 SCC 17, (Can.) para. 48-51 available at http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8004/index.do.

172 *See Van Breda*, 2012 SCC 17 (Can.).

is, in line with current trends in Canadian jurisprudence.[173] The *Van Breda* Court acknowledged that this was the direction the Ontario Court of Appeal was heading in, but that the list of connecting factors should not include factors based on fairness, efficiency, and comity.[174]

As a result, the Canadian Supreme Court replaced the list of eight factors in *Muscutt* with four factors of its own: the defendant was domiciled in the province; the defendant carries on business in the province[175]; the tort was committed in the province; and a contract connected with the dispute was created in the province.[176] In creating these four connecting factors, the Court rejected the fairness and injury factors from *Muscutt* on the grounds that they are too attenuated and should not be separated from the factual factors announced in *Van Breda*.[177]

Of particular interest to this comment is the *Van Breda* court's removal of the *Muscutt* factor considering whether an action is inter-provincial or international in nature. The Court determined that issues relating to foreign law may remain helpful in determining jurisdiction.[178] However, it cautioned that focusing on juridical disadvantages in jurisdictional analysis is not "consonant with the principle of comity which should govern legal relationships between modern democratic states."[179]

The four connecting factors create a rebuttable presumption for the defendant, but do not create a rebuttable presumption in favor of the plaintiff.[180] Thus, the *Van Breda* Court moved from what it saw as an over-inclusive, unpredictable list of factors, to a more fact-based,

---

173 *See id.*, 2012 SCC 17 (Can.) at para. 75-79 (indicating that the CJPTA and other sources of jurisprudence need to be aligned with a set of rebuttable presumptive factors).

174 *Id.* ¶¶ 74, 79, 82, 84.

175 *See id.* ¶ 87 (recognizing that though carrying on business in the province may be a presumptive factor in favor of jurisdiction, there are some business activities such as advertising and web site access in the jurisdiction which cannot give rise to a presumption of jurisdiction).

176 *Id.* ¶ 90(d).

177 *Id.* ¶¶ 84-89.

178 *Van Breda*, 2012 SCC 17 (Can.) at para. 63.

179 *Id.*

180 *See id.* ¶¶ 92-93; *see also* Pliszka, *supra* note 129, at 277.

clear set of factors for determining whether a real and substantial connection exists.[181] As an example of this rebuttable presumption, the Court posed the hypothetical situation in which the factor at issue is that a defendant carries on business in the forum.[182] According to the court, a possible rebuttal to this presumption is that the subject matter of the suit is unrelated to the defendant's business activities in the forum, similar to one of the categories of cases identified in *International Shoe.*[183]

Van Breda involved a couple who contracted in Ontario with Club Resorts Ltd. for sport services at a club in Cuba, managed by Club Resorts.[184] Shortly after the trip began, Ms. Van Breda was catastrophically injured on the beach when a metal contraption collapsed on her.[185] Upon return from Cuba, Ms. Van Breda and Mr. Berg moved to Calgary and British Columbia, but never returned to Ontario.[186]

Relying on the four presumptive factors created by the Canadian Supreme Court, the Court held that the Ontario court could exercise jurisdiction.[187] The Court reasoned that because the contract for services was created in Ontario, the Ontario court properly claimed jurisdiction.[188] According to the court the injury resulted from the obligations created by the contractual relationship which began in Ontario.[189]

---

181 *See* Pliszka, *supra* note 129, at 4.

182 *Van Breda*, [2012] SCC 17, (Can.) at para. 96.

183 *Id.*; *cf. Int'l Shoe*, 326 U.S. at 318 (continuous and systematic contacts may not be enough to support jurisdiction).

184 *Van Breda*, [2012] SCC 17, (Can.) at para. 2-3 (The contract created an obligation for Mr. Berg to teach two hours of tennis per day at the resort in return for room and board at the resort for himself and Ms. Van Breda).

185 *Id.* ¶ 4.

186 *Id.*

187 *Van Breda*, [2012] SCC 17 (Can.) at para. 118.

188 *Id.* ¶ 117. The court determined that Club Resorts' advertising in Ontario was not sufficient to establish jurisdiction because advertising is often international or global, and allowing advertising to confer jurisdiction would subject large commercial organizations to jurisdiction almost anywhere in the world, *id.* ¶ 114.

189 *Id.* ¶ 117.

Despite the shift in *Van Breda* to a more delineated set of factors, Monestier believes that the court too quickly discounted "fairness" to achieve "order."[190] While Monestier acknowledges that the Canadian Supreme Court moved in the correct direction with its decision in *Van Breda*, she believes the Court moved to a system which is too rigid.[191] While this is a fair criticism of the *Van Breda* decision, the general consensus is that the change was a much needed one, as Ms. Monestier herself acknowledges.[192] The shift by the Canadian Supreme Court in *Van Breda* recognizes the Court's desire to dissipate the attempt to balance "fairness" and "order" in favor of order.[193]

II. ANALYSIS

As Ms. Monestier points out, the change in tide made by the Supreme Court of Canada in *Van Breda* ushers in a new understanding and era of *ex juris* jurisdiction in Canada.[194] Because of the new direction of Canadian *ex juris* jurisdiction, the Canadian Supreme Court has more closely aligned *ex juris* jurisdiction in Canada with that of the United States. As a result, the United States and Canada will be able to increase comity with one another resulting in greater cooperation in transnational cases. Further, greater cooperation between the two nations may further smooth the path for increasing economic ties with one another.

A. A Fading Border: Closing the Gap Between Canadian Jurisdiction and American Jurisdiction

Professor Black acknowledges that recognition of foreign judgments is more likely when the two countries involved have similar

---

190 Monestier, *supra* note 6, at 398.

191 *Id.* at 412.

192 *Id.* at 410-11; *see also* Pliszka, *supra* note 129.

193 *See* Monestier, *supra* note 6, at 410; *compare Van Breda*, [2012] SCC 17 (Can.) at para. 99 (stating that a court is not required to hear only the tort which could be connected with the jurisdiction when there are multiple torts at issue), *with McNichol*, (2001) CanLII 5679 at para. 12 ("I do not agree that where an action has some claims with an extra-territorial dimension, and others which have none, the former must be tested in isolation").

194 *See* Monestier, *supra* note 6, at 410-11.

or identical standards for personal jurisdiction.[195] As the new tide in Canadian *ex juris* jurisdiction commences, the *Van Breda* factors appear to align the new Canadian jurisdiction closer to that of the United States.[196]

1. Van Breda Factors One and Two: A Defendant-Centric Approach. – The first *Van Breda* factor, whether or not the defendant was domiciled in the province, aligns itself well with the minimum contacts doctrine provided in *International Shoe*.[197] At the base of Justice Stone's approach in *International Shoe* is the previous notion of personal jurisdiction dating back to *Pennoyer*, a defendant domiciled in a state is subject to personal jurisdiction.[198] This a very defendant-centric approach.

The first *Van Breda* factor has brought personal jurisdiction in Canada to a clear, defendant-centric approach as well.[199] The court stated that a plaintiff's presence in a jurisdiction is not sufficient to create a relationship between the jurisdiction and the subject matter, but that a defendant may always be sued in a jurisdiction in which he resides.[200] This language has the same basic notion as that in *Pennoyer*, the defendant's domicile is the important consideration.[201] Further, by looking at *Keeton*, the United States Supreme Court's relative disinterest in the domicile of the plaintiff is just as clear as that of the Canadian Supreme Court.[202]

---

195 *See* Vaughan Black, *A Canada-United States Full Faith and Credit Clause?*, 18 SW. J. INT'L L. 595, 606-10 (2011).

196 *See Burger King*, 471 U.S. 462; *Keeton*, 465 U.S. 770; *World-Wide Volkswagen*, 444 U.S. 286; *Int'l Shoe*, 326 U.S. 310; *Hess*, 274 U.S. 352; *Gray*, 22 Ill. 2d 432; *Van Breda*, [2012] SCC 17 (Can.).

197 *See Int'l Shoe*, 326 U.S. at 316; *Van Breda*, [2012] SCC 17 (Can.) at para. 86.

198 *See Int'l Shoe*, 326 U.S. at 316; *see also Pennoyer*, 95 U.S. at 720.

199 *See Van Breda*, [2012] SCC 17 {Can.) at para. 86; *see also* Pliszka, *supra* note 129, at 5-6.

200 *See Van Breda*, [2012] SCC 17 (Can.) at para. 86.

201 *See Pennoyer*, 95 U.S. at 720.

202 *Compare Keeton*, 465 U.S. at 780 (stating that a plaintiff's "lack of residence will not defeat jurisdiction established on the basis of defendant's contacts"), *with Van Breda*, [2012] SCC 17 at para. 86 (stating that a plaintiff's presence in a jurisdiction "will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant").

Van Breda's second factor, whether the defendant carries on business within the province, is linked to the idea of purposeful availment, originating in *Gray v. American Radiator*,[203] but first used by the United States Supreme Court in *Worldwide Volkswagen*.[204] Once again this factor, like its American counterpart, is defendant-centric.[205]

The Canadian Supreme Court determined that the broad announcement of a rule relating to the business activities of a defendant in a forum was ill-advised.[206] The United States Supreme Court came to this same conclusion in *World-Wide Volkswagen*.[207]

Additionally, the Canadian Supreme Court's explanation of this factor is similar to general jurisdiction in the United States.[208] Part of the Canadian Supreme Court's explanation states one way to satisfy this factor is through "maintaining an office [in the jurisdiction]."[209] Such reasoning is precisely what the United States Supreme Court used in *Perkins v. Benquet Consol. Mining Co.* to determine the defendant was domiciled in Ohio.[210]

While the first two *Van Breda* factors have aligned U.S. and Canadian personal jurisdiction as they relate to the domicile and business activities of the defendant, the last two factors revolve around the subject matter at dispute in a case.

2. Van Breda Factors Three and Four: Subject Matter Focus. - *Van Breda's* third factor, whether the tort was committed in the province, finds an American counterpart in both *Pawloski* and *Keeton*.[211] This

---

203 *See Gray*, 22 Ill. 2d at 441.

204 *See World-Wide Volkswagen*, 444 U.S. at 297-98.

205 *See* Pliszka, *supra* note 129, at 5-6.

206 *See Van Breda*, [2012] SCC 17 (Can.) at para. 87.

207 *See World-Wide Volkswagen*, 444 U.S. at 297.

208 *See Goodyear*, 131 S. Ct. at 2853-54; *see also* Hoffheimer, *supra* note 13, at 551.

209 *Van Breda*, [2012] SCC 17 (Can.) at para. 87.

210 *See Perkins*, 342 U.S. 437.

211 *See Keeton*, 465 U.S. 770 (considering the desire of the jurisdiction in which the harm was incurred to resolve the case); *see also Hess*, 274 U.S. 352 (involving a car accident in a jurisdiction the defendant did not reside in); *Van Breda*, [2012] SCC 17 (Can.) at para. 88.

factor and the fourth factor both focus on the subject matter at dispute.[212]

While the minimum contacts doctrine focuses on the defendant's locale and actions, it also examines the impact of the tort action in the jurisdiction.[213] *Keeton* serves as the best example. The *Keeton* court focused attention on the idea that the state in which the tort took place has an interest in remedying the harm done within its borders.[214]

The *Van Breda* Court appears to be addressing the same concern through this factor. It describes *Tolofson v. Jensen*[215] as the common law starting point for serious consideration of the *situs* of a tort as a factor to consider in jurisdictional analysis.[216] *Tolofson* determined that in some tort cases, the *lex loci delicti* must apply to help preserve order.[217]

Van Breda's fourth factor, whether a contract connected with the dispute was made in the province, finds similarities to *Burger King*.[218] Both cases place upon their respective jurisdictional standards an impetus to consider the creation of a contract sufficient for recognizing jurisdiction over the parties.[219] In doing such both courts concerned themselves with addressing the impact of the subject matter at dispute in determining jurisdiction.

---

212 *See* Pliszka, *supra* note 129, at 5-6.

213 *See, e.g.*, *Keeton*, 465 U.S. 770.

214 *See id.* at 776.

215 Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon, [1994] 3 S.C.R. 1022 available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1209/index.do (then click on PDF document).

216 *See Van Breda*, [2012] SCC 17 (Can.) at para. 88.

217 *Tolofson*, [1994] 3 S.C.R. at 1058.

218 *See Burger King*, 471 U.S. 462; *Van Breda*, [2012] SCC 17 (Can.) at para. 88.

219 *See Burger King*, 471 U.S. at 480-81; *Van Breda*, [2012] SCC 17 (Can.) at para. 88.

B. Recognition of Foreign Judgments

Since the decision in *Morguard*, Canada has been recognizing and enforcing United States' judgments with more consistency.[220] Justice LaForest wrote in *Morguard*, "[m]odern times [require that] the flow of wealth, skills, and people across boundaries be facilitated in a fair and orderly manner."[221] Thus, while *Morguard* is limited to intra-provincial judgment disputes,[222] Canadian courts have expanded its mandate to include foreign judgments.[223]

The Canadian Supreme Court emphasized in *Van Breda* that jurisdiction and recognition of judgments are intertwined.[224] As a result, the framework used in determining a court's jurisdiction can have an impact on a court's recognition of judgments and vise versa.[225] Further, in *Muscutt*, the Canadian Supreme Court emphasized that one aspect of comity includes the consideration of jurisdictional standards as well as judgment recognition and enforcement in other countries.[226] Considering this, along with Black's observation that greater international judgment recognition occurs when countries have similar personal jurisdiction standards, the opportunity for increased comity between the United States and Canada is greater after *Van Breda*.

The choice by Canadian courts to expand recognition and enforcement to foreign judgments has not been applauded by all of Canada, its legal scholars, and even its courts and judges.[227] However, as Canadian attorney Allison Sears notes, "[i]t seems a fair assumption however, that the ease with which the Court embraced the extension

---

220 *See* Black, *supra* note 195, at 612; Ivan F. Ivankovich, *Enforcing U.S. Judgments in Canada: "Things are Looking Up!"*, 15 NW. J. INT'L L. & BUS. 491, 491 (1994-95).

221 *Morguard*, [1990] 3 S.C.R. at 1078 (Can.).

222 *See* Ivankovich, *supra* note 220, at 499.

223 *See* Black, *supra* note 195, at 612.

224 *See Van Breda*, [2012] SCC 17 (Can.) at para. 16.

225 *Id.*

226 *See* Muscutt, [2002] CanLII 44957 at para. 102.

227 *See, e.g.*, Foreign Judgments Act, R.S.N.B. (2011) c. 162; *see also* Civil Code of Quebec, S.Q., c. 64, arts. 3155-63 (1991); Allison M. Sears, *Beals v. Saldanha: The International Implications of Morguard Made Clear*, 68 SASK. L. REV. 223, 229-30 (2005) (stating Justice LeBel disagreed with the majority in Beals v. Saldanha, (2003) SCC 72, believing that the test should be focused more on fairness to the defendant).

of *Morguard* into the international realm was largely due to the similarity between the Canadian and American legal systems."[228]

Even more so than Canada, the United States recognizes and enforces Canadian judgments. To this effect, a majority of states have adopted statutes similar to the Uniform Foreign Money Judgments Recognition Act.[229] This act allows for recognition of foreign court judgments which are final, conclusive, and enforceable where rendered.[230]

One of the three requirements for non-recognition is that the foreign court lacks personal jurisdiction.[231] As a result, though Canada and the United States have much in common with one another and, to an extent, already recognize and enforce one another's judgments, bringing the two countries' standards for personal jurisdiction closer together will likely decrease the opportunity for this non-recognition requirement to materialize.

Because both countries currently recognize one another's judgments with very little friction, the impact of aligning the two standards for personal jurisdiction will not be all that substantial. However, though the impact seems minimal, it is an issue which is worthy of discussion.[232] Four Canadian provinces do not currently apply the *Morguard* standard to American judgments.[233]

Further, there is Canadian legislation limiting recognition in certain areas, most notably, antitrust and judgments rendered under the Cuban Liberty and Democratic Solidarity Act of 1996.[234]

While the LIBERTAD issue is substantially legislative, further aligning personal jurisdiction standards may encourage those

---

228 Sears, *supra* note 227, at 242.

229 Todd J. Burke, *Canadian Class Actions and Federal Judgments: Recognition of Foreign Class Actions in Canada*, BUS. LAW TODAY, Sept./Oct. 2007, at 48.

230 13 U.L.A. 261 § 1(2) (1986).

231 *Id.* § 4(a)(1)-(3).

232 *See* Black, *supra* note 195, at 619.

233 New Brunswick, Quebec, and British Columbia do not enforce foreign judgments, and Saskatchewan will only enforce the damages portion of a judgment, but not the punitive portions. *See* Black, *supra* note 192, at 613-14.

234 *See* Black, *supra* note 195, at 614.

provinces which take issue with enforcing foreign judgments to become more cooperative with U.S. courts in recognizing judgments. Similarity between the two standards may provide greater assurance that the treatment parties in Canada receive is similar to that received by parties litigating in the United States.[235]

Are there other measures which would be more appropriate? Numerous authors have written about the idea of either a bilateral treaty or enforcement convention to assist the two countries in their recognition of one another's judgments.[236] However, as professor Black acknowledges, the chances of the legislatures of either country taking the required initiative to enact such a treaty or convention is not particularly likely.[237] With the floundering likelihood that these measures will be taken, bridging the gap between the two countries' personal jurisdiction standards seems to present itself as a more viable solution, or at the very least, a holdover until a more definite solution can be achieved.

C. Van Breda's Implications for Foreign Class Action Suits

Moving beyond enforcement of one another's judgments, the new real and substantial framework defined in *Van Breda* has its greatest implications in cases that have yet to be decided. More specifically, in the future of transnational class action suits.[238]

When it comes to a Canadian court recognizing a class action judgment rendered in the United States, one of the major factors, and only one concerning this comment, in determining whether to enforce the judgment is whether there is a "real and substantial connection in favor of the foreign jurisdiction."[239] Canada and the United States

---

235 *See id.* at 610.

236 *See, e.g.*, Black, *supra* note 195 (discussing his view that an enforcement convention between the U.S. and Canada, while also evaluating other scholars' suggestions regarding conventions and treaties).

237 *See id.* at 625.

238 *See* Burke, *supra* note 229, at 51 (noting that proper jurisdiction is a major factor in recognition of class action judgments in Canada).

239 Burke, *supra* note 229, at 50 (citing Currie v. McDonald's Restaurants of Canada Ltd., (2005) CanLII 3360 (ON CA)).

differ from one another in certain aspects of class action litigation, including how classes are defined[240] and issue requirements.[241]

As *Currie* informs us, the presence of a real and substantial connection is important.[242] This requirement is also expressed in the United States in the Uniform Money Judgment Enforcement Act.[243] Thus, the movement towards similar standards of personal jurisdiction has the potential to increase the frequency of recognition of United States class actions which include Canadian citizens.

To what extent the new definition of the real and substantial connection standard will have on class actions is still unproven. More specifically, how many of the members in a class will have to meet the standards set forth in *Van Breda*?[244] The direction of Canadian courts is likely to lead to a requirement that only one of the class members meets one of the presumptive *Van Breda* factors.[245] This determination finds support in the Canadian focus on common issues class definition.[246]

However, this is the point at which a question arises regarding whether class actions based in Canada will be enforced in the United States since American courts define classes based on amount in controversy requirements.[247] The history of U.S. recognition of Canadian judgments and the importance put on a minimum contacts/real and substantial connection under the Uniform Act, along

---

240 The United States has a numerosity requirement for a class to be created. FED. R. CIV. P. 23. Canada only requires two persons to create a class. Class Proceedings Act, R.S.B.C., c. 50, §§ 4(1), 7, 27 (1996); Class Proceedings Act 1992, S.O., c. 6, §§ 5(1), 6, 25 (1992); *see also* Western Canadian Shopping Centres Inc. v. Dutton, [2001] SCC 46, at para. 37.

241 The United States has an amount in controversy requirement to certify a class. 28 U.S.C. § 1332. Canada requires that there be a common issue to certify a class. *See, e.g.*, B.C. Class Proceedings Act, Division 3, Part 3, s. 20(3)(a).

242 *See Currie*, [2005] [Can.] CanLII 3360 at paras. 11-2.

243 *See* Burke, *supra* note 229, at 51.

244 *See* David Paulson, Note, *Canada Update: A New Framework for Determining Jurisdiction, the Application of Forum Non Conveniens, and Limitations of the Solicitor-Client Privilege*, 18 LAW & BUS. REV. AM. 411, 416-17 (2012).

245 *See id.* at 417.

246 *See* B.C. Class Proceedings Act s. 20(3)(a); *see also* Burke, *supra* note 226, at 49.

247 28 U.S.C. § 1332.

with Justice Winkler's recognition that "practical differences [between U.S. and Canadian classes] are more apparent than real," leads to the belief that the new *Van Breda* factors are more likely to lead to greater cross-border enforcement than detract from it.[248]

D. What's to Become of Us?: The Implications of Van Breda on the U.S.-Canadian Trade Partnership

Finally, the implications of the *Van Breda* decision on comity and trade between the two nations is of significant importance. Justice LaForest noted the importance of movement of people, skills, and wealth.[249] In 2013 the U.S. exported 277,038.3 million dollars worth of goods to Canada while importing 305,384.8 million dollars worth of goods from Canada.[250] The staggering amount of trade that these two countries share illustrates the importance of the economic friendship between these nations. While that partnership has been in existence for decades and will likely continue for decades to come, what underlies those numbers is the sheer amount of interaction that U.S. and Canadian persons and companies have with one another. From interaction, conflict arises. That conflict must be directed toward the courts of either the U.S., Canada, or both. The increased efficiency that the *Van Breda* decision provides may be miniscule or large. Only time will tell. However, as Professor Black notes, to shrug off the minor differences between the U.S. and Canadian courts regarding personal jurisdiction would be a mistake.[251] Those differences do not produce much wake in the individual case, but in the aggregate the transaction costs become much more significant.[252] With a partnership as large as that of the U.S. and Canada, the alignment of their personal jurisdiction standards may have a positive effect on lessening those transaction costs and thus trade costs.[253]

---

248 *See* Burke, *supra* note 229, at 51 (quoting Justice Winkler in regards to the *Nortel Networks* litigation).

249 *Morguard*, [1990] 3 S.C.R. at 1096.

250 *Trade in Goods with Canada*, UNITED STATES CENSUS BUREAU, http://www.census.gov/foreign-trade/balance/c1220.html(last visited Jan. 26, 2014).

251 *See* Black, *supra* note 195, at 619.

252 *See id.* at 617, 624.

253 *See id.* at 617.

CONCLUSION

The development of personal jurisdiction over *ex juris* defendants has developed in the form of the minimum contacts test in the United States, and the real and substantial connection standard in Canada. Both tests value the importance of fairness and order.

The minimum contacts test has evolved into a test which focuses on the connection between the defendant and the forum. It was not until 2012 that Canada caught up. Prior to the *Van Breda* decision, the real and substantial connection standard focused on the plaintiff, defendant, and nature of the claim. *Van Breda* narrowed that focus to the defendant and subject matter of a claim, further aligning the U.S. and Canadian personal jurisdiction standards.

As a result, greater comity between the U.S. and Canada can ensue. While as of late there has not been large amounts of friction between these two countries, commentators have noted that even a small amount of friction is worth addressing, because aggregate transaction costs involved in a trade partnership as large as that the U.S. and Canada have can be large.

Any steps toward streamlining transactions, in this case judicial cooperation, comity, and judgment recognition, can help in reducing those costs. Reduced transaction costs leads to more efficient trade and a greater relationship between the U.S. and Canada.

Realistically, the impact of the *Van Breda* decision will likely be relatively small in respect to the relationship between the U.S. and Canada, but as Pink Floyd sang "[it's] just another brick in the wall."[254]

---

[254] PINK FLOYD, *Another Brick in the Wall Part 2*, *on* THE WALL (Columbia Records 1979).