CITATION: Innis et al. v. Sunwing Travel Group Inc. et al, 2024 ONSC 1102
COURT FILE NO.: CV-19-1373
DATE: 2024/02/21

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jennifer Ann Marie Innis, deceased by her Estate Trustee, Daniel Joseph Innis, Daniel Joseph Innis et. al., **Plaintiffs**

AND:

Sunwing Travel Group Inc., Sunwing Vacations Inc. Toufik Benhamiche, Kahina Bensaadi et. al., **Defendants**

BEFORE: Mr. Justice Joseph Perfetto

COUNSEL: David Williams, for the Plaintiffs

Nawaz Tahir, for the Defendants

HEARD: November 15, 2023

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ENDORSEMENT

Introduction:

1. Toufik Benhamiche and Kahina Bensaadi (the moving parties) bring a motion seeking various orders from this Court, although, they do not attorn to this jurisdiction for the purposes of this motion. The moving parties seek an order recognizing that this Court lacks jurisdiction or, in the alternative, that I grant summary judgment to the same effect. If it is found that jurisdiction exists in this Court, the moving parties request a stay of the action on the basis that Ontario is not the most appropriate forum. If this Court finds jurisdiction and does not accept that Ontario is not the most appropriate forum, the moving parties request summary judgment with respect to Kahina Bensaadi.

2. For the reasons that follow, I find that jurisdiction does exist and that said jurisdiction ought be exercised, as Ontario is the most appropriate jurisdiction for this action to be tried. I decline to order summary judgment with respect to either the jurisdictional issue or with respect to the action as it pertains to Kahina Bensaadi.

3. I decline the moving parties further alternative request for a Declaration that the plaintiff's entitlement to damages are to be limited to the damages available pursuant to the Cuban Civil Code. This is a matter best left when the moving parties have filed a statement of defence and when the purported legal expert's opinion is properly before the court and after the plaintiffs have had an opportunity to cross-examine the purported expert.

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Overview:

4. What follows is a brief overview of the events. Other aspects of this case are discussed within the context of the issues arising in this motion. In July 2017, Jennifer Ann Marie Innis ("Jennifer") and her husband Daniel Joseph Innis ("Daniel"), collectively referred to in these reasons as the plaintiffs[1], were vacationing in Cuba. In May of 2017 the plaintiffs purchased a vacation package to Cuba through Expedia Canada Corp. ("the Vacation Contract"). Sunwing Vacation Inc. and Sunwing Travel Group Inc. are both corporations and were the parties who supplied the vacation in Cuba ("the Sunwing defendants"[2]). The Sunwing defendants are incorporated in Ontario, with their head office located in Etobicoke, Ontario. The moving parties were also vacationing in Cuba at the same resort.
5. Jennifer and Daniel arrived in Cuba and stayed at a hotel in Cayo Coco, Cuba, as per the Vacation Contract. The hotel resort was operated by the defendant Blue Diamond. When Jennifer and Daniel arrived at the hotel resort, they were met by one Mr. Gonzalez who was working at a booth demarcated as NexusTours. Mr. Gonzalez represented himself as a representative of the Sunwing defendants.

6. The moving parties arrived in Cuba on July 1, 2017. They too met with Mr. Gonzalez upon arrival, having booked their vacation through the Sunwing defendants. The moving parties stayed at the same resort as Jennifer and Daniel.

7. On July 6, 2017, Jennifer and Daniel purchased a speedboat excursion at the aforementioned NexusTours. The moving parties booked the same speedboat excursion. They did so through the Sunwing representative, Mr. Gonzalez. The speed boat excursion was to take place on July 7, 2017.

8. On July 7, 2017 Jennifer, Daniel, the moving parties and others met in the lobby of their hotel and were all transported to the marina. Upon arrival and after some instruction[3], the moving parties and their two children boarded their designated speed boat. The evidence before me suggests that boat was only designated to carry two people. Jennifer and Daniel

[1] The plaintiffs include Jennifer Ann Marie Innis, deceased, by her Estate Trustee, Daniel Joseph Innis and includes others listed as plaintiffs in the style of cause. However, for the purpose of these reasons and for simplicity, the plaintiffs refer to Jennifer Ann Marie Innis and Daniel Joseph Innis.
[2] These include the Sunwing defendants and the Sunwing Subsidiary defendants.
[3] The nature and scope of the instructions is an issue in this litigation.

boarded their own designated speed boat. Jennifer was behind the wheel. They waited for their turn to depart.

9. The moving parties departed the dock. The point of the excursion was to drive the speed boat at a high rate of speed. Mr. Benhamiche was operating the moving parties' speedboat, when it lost control after achieving a high rate of speed. The boat turned toward the dock area and drove over top of Jennifer, who along with Daniel, had not yet left the dock. Jennifer died as a result of the injuries that she sustained.

10. Daniel was eventually interviewed by police in the presence of a person who purported to act as Daniel's counsel. Daniel eventually returned home to Ontario.

11. Mr. Benhamiche was tried in the Provincial People's Court of Ciego de Avila, Cuba and convicted of homicide by imprudence. Apparently, the basis for his conviction was that he took too many passengers aboard the speedboat, causing the collision and death of Jennifer. He was sentenced to four years in prison but successfully appealed his conviction but was convicted again at his re-trial. His sentence was reduced from four years. He was eventually granted permission to leave Cuba. Other than Mr. Benhamiche no other person or corporation was prosecuted in Cuba. Mr. Benhamiche returned to Quebec and resides there with Ms. Bensaadi.

12. The plaintiffs' claim is based in torts and breach of contract and statutory duties. Their claim can be summarized as follows:

> The plaintiffs plead negligence and breach of statutory duties and contractual misrepresentations in Ontario pursuant to the *Competition Act*, R.S.C. 1985 c. C-34, the *Consumer Protection Act*, 2002, S.O. 2002, c. 30 Sched. A, and the *Travel Industry Act*, 2002, S.O. 2002 c. 30 Sched. D in respect of the Sunwing Defendants and their subsidiaries and partners, including the NexusTours defendants and Hotel Resort defendants, for a number of advertising, marketing, and branding practices, and consumer transactions.
>
> The plaintiffs claim that Jennifer died as a result of the conduct of all of the defendants which includes negligence, breach of contract, joint venture, misrepresentation and breach of statutory duties and warranties which commenced in Ontario and culminated in the cause of the collision in Cayo Coco, Cuba.[4]

[4] Factum of the Responding Parties/Plaintiffs, at paras.58-59.

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13. The pleadings make clear that the scope of litigation is beyond steps taken to arrange the excursion in Cuba and beyond the accident itself.

Position of the Parties:

14. The moving parties argue that this Court does not have jurisdiction in relation to this action. The incident took place in Cuba, off of the resort that the moving parties and the plaintiffs were staying in, not Ontario. The plaintiffs purchased the excursion, not in Ontario, but in Cuba. The moving parties (Mr. Benhamiche and Ms. Bensaadi) reside in Quebec. According to the moving parties, the *only* connection to this jurisdiction is that the plaintiffs reside in Ontario.

15. The moving parties, therefore, request either an order granting summary judgment with respect to the issue of jurisdiction or an Order dismissing the action as Ontario has no jurisdiction over the matter. With respect to summary judgment, the moving parties argue that they are entitled to this remedy notwithstanding they have decided not to issue a statement of defence in this matter. Both requests for relief, although relying on different *Rules* within the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, ("the Rules"), ought to result in a finding that there is no jurisdiction in this Court to deal with this action and that the action should be dismissed.

16. The moving parties advance an alternative argument, in the event that this Court finds that jurisdiction exist in Ontario to deal with this action. In that event, the moving parties argue that Ontario is not the most appropriate forum, but rather Cuba or perhaps Quebec is the most appropriate forum.

17. In the further alternative, the moving parties request a Declaration that the plaintiffs' entitlement to damages are limited to the damages available pursuant to the Cuban law as set out in the Cuban Civil Code.

18. In responding to the motion, the plaintiffs argue that jurisdiction exists in this Court to deal with this action. While the moving parties are not domiciled in Ontario, the other defendants are. Moreover, the contracts are central to this action and they were made in Ontario, not Cuba or elsewhere. Cuba was the location where the conduct that is the basis for this litigation culminated into extremely unfortunate circumstances, however, the relevant legal factors militate only in favour of there being a real and substantial connection between this action and Ontario. This, notwithstanding that the incident which led to Jennifer's death occurred in Cuba.

19. The plaintiffs argue that once jurisdiction is found to exist in Ontario, the moving parties have been unable to demonstrate that Cuba is a more appropriate forum for this litigation.

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However, if this Court were to find that there is not a real and substantial connection so as to conclude that jurisdiction does not exist, the plaintiffs rely on the doctrine of necessity and request that this court assume jurisdiction. The position is based on these circumstances and on the evidence of how this matter has been dealt with thus far under the Cuban justice system.

20. The other defendants did not file responding materials on this motion but, through legal counsel, provided their position in writing, which is as set out below:

> We represent the defendants, Sunwing Travel Group Inc., Sunwing Vacations Inc., NexusTours and Blue Diamond Hotels and Resorts Inc. in the above-referenced matter.
>
> I write to advise this Court that Sunwing, NexusTours and Blue Diamond will not be filing responding motion material with respect to the co-defendants, Toufik Benhamiche and Kahina Bensaadi's motion but support the positions advanced by the plaintiffs on this motion.[5]

The Law and Analysis:

Does jurisdiction exist in Ontario in relation to this action?

21. Rule 21.01(3)(a) provides that a defendant may move to have an action stayed or dismissed on the basis that the court does not have jurisdiction over the subject matter of the litigation.

22. The leading case in this area is *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572 (*Van Breda*). *Van Breda* was concerned with the "real and substantial connection" test, a common law test to be applied when courts are asked to assume jurisdiction over a matter. The court's task is to determine whether it has jurisdiction and if so, whether to exercise it, in the circumstances of the case.

23. In determining whether jurisdiction exists, the court must determine whether there is a real and substantial connection between the legal circumstances or the subject matter of this action *and*, in this case, Ontario. The Court in *Van Breda* set out four factors that apply to tort matters and which I apply to the present circumstances, to determine whether there is a real and substantial connection, as outlined above.

24. The four factors that are to be considered are as follows:

    (a) The defendant is domiciled or resident in the province.
    (b) The defendant carries on business in the province.

[5] Letter of Counsel - Clay S. Hunter of pmlaw, dated October 27, 2023.

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(c) The tort was committed in the province; and
(d) A contract connected with the dispute was made in the province.

25. These four factors are given presumptive effect and stand in the place of a system where pure judicial discretion is relied upon to resolve jurisdictional issues on a case-by-case basis.

26. The plaintiffs, who seek to have this Court assume jurisdiction, bear the burden of establishing that at least one presumptive factor connects the litigation to Ontario. If the plaintiffs are able to do so, jurisdiction *simpliciter* is established, subject to the moving party showing that the connection is rebutted. The moving party may rebut the presumption of jurisdiction by demonstrating that the presumptive connecting factor does not actually point to any real relationship between the forum and the litigation or that the connection is tenuous, all in an effort to convince the court that it would be inappropriate to assume jurisdiction over the litigation.[6] If the court finds that either no presumptive factors link the litigation to the forum or that the opposing party has rebutted the connection assumed through the presumptive factor, there will be no jurisdiction absent the application of the doctrine of necessity. If, on the other hand, jurisdiction is established, the claim would proceed in that forum (here, Ontario) subject only to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. The latter doctrine is one invoked by the opposing party (the moving party, here) and requires a showing that another jurisdiction is not merely a comparable forum but a clearly more appropriate forum to dispose of the litigation efficiently and fairly, given all of the circumstances.

27. Although the above list is not exhaustive, where the damages were sustained, on its own, is not a factor that informs whether there is a real and substantial connection.

28. Once a court finds there to be jurisdiction and that is not rebutted or, alternatively, the doctrine of *forum non conveniens* does not require the matter to be dealt with elsewhere, the court assumes jurisdiction over *all* aspects of the case. In this case, that means that the court would assume jurisdiction over the aspects of the litigation grounded in tort and contract[7]. Similarly, once the court determines that it has jurisdiction and ought to exercise it, jurisdiction is assumed over *all* defendants and all claims. To find otherwise would lead to splitting of the action, which is not desirable for obvious reasons.

29. Below, I deal with each of the presumptive *Van Breda* factors.

[6] *Van Breda* at para. 95-100.
[7] Van Breda at para. 99.

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The defendant is domiciled or resident in the province:

30. The Court in *Thind v. Polycon Industries*, [2022] O.J. No. 1778 (*Thind*), considered a case with multiple defendants and multiple claims. In the present circumstances, some but not all of the defendants are domiciled in Ontario and some but not all claims arise from conduct in Ontario. In *Thind,* Justice M.T. Doi observed the following:

> **34** Under the jurisdiction *simpliciter* analysis, the court should consider not only whether jurisdiction may be assumed over individual defendants but also whether jurisdiction should be assumed over the claim or the dispute: *Van Breda* at paras 17 and 90. As Broad J. observed in *Khan* at paras 16 and 17:
>
> > [16] In my view, the enquiry should not be focused only on whether the court is entitled to assume jurisdiction over the individual defendants but should also focus on whether jurisdiction should be assumed over the claim or the dispute. At para 17 of *Van Breda,* Justice LeBel identified the two issues in the appeals as follows, "First, were the Ontario courts right to assume jurisdiction over the claims of [the plaintiffs] and over [the defendant]. Second, were they right to exercise the jurisdiction and dismiss an application for a stay based on *forum non conveniens*?" (underlining added). At para. 90, Justice LeBel introduced the list of presumptive connecting factors as factors that *prima facie* "entitle the court to assume jurisdiction over a dispute" (underlining added). At para. 99 he stated that "the purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant" (underlining added) The first presumptive factor considers whether the defendant is domiciled or resident in the province: *Van Breda* at para 90.
> >
> > [17] The fact that the enquiry is concerned with assumption of jurisdiction over the dispute, and not simply on the circumstances of the individual defendants, is further exemplified by the fact that two of the presumptive connecting factors, (c) and (d), have nothing directly to do with the situation of the moving defendants and their connection to the forum. [Emphasis in original]
>
> **35** The importance of considering the claim or dispute in the jurisdiction *simpliciter* analysis is emphasized by LeBel J.'s reasons in *Van Breda* at para 99 which noted the following:
>
> I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and

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> efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency. [Emphasis added]
>
> **36** Similarly, R.A. Blair J.A. writing for the Court of Appeal in *M.J. Jones Inc. v. Kingsway General Insurance Co.*, 2004 CanLII 10547 (ONCA) at para 22 noted that in a case with multiple defendants and claims, some having an extra-territorial dimension, the jurisdiction *simpliciter* analysis must consider the claim as a whole without treating the claim against the foreign defendant as a separate action: see also *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp*. (2003), 63 OR (3d) 431 (CA) at para 38, leave to appeal denied [2003] SCCA No 186. In addition, Blair J.A. acknowledged the need to assess the connection with Ontario having regard to the subject matter of the litigation to include both the claim against the foreign defendant and the claims against the domestic defendants, with the guiding factors under the real and substantial connection test being order and fairness: *M.J. Jones* at para 23. Where the requirements of order and fairness are served by trying the foreign claim together with the claims that are clearly rooted in Ontario, the foreign claim will meet the real and substantial connection test, even if that claim would fail the test if it were constituted as a separate action: *McNichol Estate v. Woldnik*, 2001 CanLII 5679 (ONCA) at para 13. This allows the court the flexibility to balance the globalization of litigation against the problems of a defendant who is sued in a foreign jurisdiction: *Ibid*.[8]

31. The above analysis is sound and renders dispositive any argument that the fact that some defendants are not domiciled in Ontario, the presumptive factor does not apply. It does apply to the present circumstances. To find otherwise would not align with the overarching principles of fairness and efficiency. Despite the moving parties not being domiciled in Ontario, the Sunwing defendants are, having their head office in Etobicoke, Ontario.[9]

[8] Thind at paras. 34-36

[9] The Mackintosh Affidavit at paras. 5 -15. Note: NexusTours and Blue Diamond appear to be controlled by the Sunwing defendants. For instance, the NexusTours brochure provided information about their app, the image of which included the same orange color as the Sunwing orange as well as the Sunwing X branding.

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32. Accordingly, as it relates to the first presumptive factor, I find a real and substantial connection. The Ontario court has presumptive jurisdiction over this action. However, I will carry on to consider the remaining Van Breda factors.

The defendant carries on business in the province:

33. In this regard, the Court in *Van Breda* provided the following insight at paragraph 87:

> Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.

34. The evidence before me makes clear that the Sunwing defendants carry on business in Ontario. This is not a case where the above caution from the Court in *Van Breda* applies. It is of note that the Sunwing defendants support the position of the responding party, ostensibly recognizing their connection to Ontario. Accordingly, the second presumptive factor supports a finding that Ontario has jurisdiction over the action and all defendants.

A contract connected with the dispute was made in the province:

35. When the claim is viewed as a whole, it is apparent that there is a real and substantial connection to Ontario. The plaintiffs' claim consists of claims against the Sunwing defendants that are based in negligence, breach of contract and breach of the statutory duties set out in the *Competition Act*, the *Consumer Protection Act*, and the *Travel Industry Act*[10]. While it is not for this Court to make findings that are properly reserved for the trial

[10] In part, the plaintiff's rely on the website associated with the Sunwing defendants which included the wording: "All tours are licensed, insured and audited to meet & surpass safety regulations" - The Mackintosh Affidavit at para. 7, 36-37 and 40-42. The theory of liability of the plaintiffs' is detailed at paras.55-58 and 78 -79, of the Plaintiffs' factum on this motion.

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judge, this Court is to view the plaintiffs' allegations as true, at this stage. The plaintiffs' allege that contracts were made in Ontario because the representations related to the boat excursion that led to the accident originated in Ontario. The plaintiffs argue that the representations and any warranties were made in Ontario by the Sunwing defendants *before* the purchase of the actual excursion. Relying on *Van Breda*, the plaintiffs argue that the relationship between them and the Sunwing defendants which led to the excursion in Cuba was initiated and formalized in the Vacation Package Contract which itself was formalized in Ontario, before attending Cuba. In my view, the plaintiffs have an arguable case in relation to the Sunwing defendants.

36. The moving parties rely on *Haufler v. Hotel Riu Palace Cabo San Lucas,* 2013 ONSC 6044 (*Haufler),* for the proposition that the operative contract in the present case was not formed in Ontario but rather in Cuba just prior to the excursion taking place. I agree with the plaintiffs, that *Haufler* is distinguishable on the basis that, unlike here, the plaintiff in that case only brought an action against the excursion operator and the hotel in Mexico. In the present case, the excursion does not stand as an island on to itself. Rather, the plaintiffs argue that the excursion was the result of conduct undertaken in Ontario by the Sunwing defendants as part of their carrying on business in Ontario, prior to the plaintiffs' arrival in Cuba. This consisted, in part, of communications from the Sunwing defendants as well as information on their webpage, including reference to the defendants managing the customer experience "from beginning to end."[11]

37. The plaintiffs also rest their claim on the position that the Sunwing defendants in Ontario, by failing to ensure that the requisite safety standards were met for the boating excursion, were negligent. This is in breach of the consumer protection legislation in Ontario and was a breach committed by the Sunwing defendants in Ontario. The plaintiffs argue that the Sunwing defendants created marketing materials that were marketed to consumers in Ontario. In this regard, the plaintiffs' negligence claim rests on the absence of any warranting within these materials with respect to the excursion.

38. It is the case that the plaintiffs' claims in negligence and breach of duty are with respect to certain defendants who are not domiciled or who do not carry on business in Ontario. However, as explained earlier in these reasons, the plaintiffs are not required to split their action on this basis.

39. Overall, the presumptive factor concerned with where the contract was formed, militates in favour of a finding that jurisdiction exists in Ontario. Although, the existence of only one presumptive factor is required to give rise to jurisdiction in Ontario, in this case, there are three.

[11] The Mackintosh Affidavit at paras. 8, 11, and 16.

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40. Accordingly, I find that there is a real and substantial connection of this action to Ontario and as such the Court in Ontario has jurisdiction over this litigation.

Rebuttable Presumption:

41. Having applied the *Van Breda* factors, I assume that the Court in Ontario is properly seized of this litigation and that the defendants are properly before this Court in this jurisdiction. However, the presumption that is seated flowing from the above analysis is rebuttable by the defendants. The basis upon which a party may rebut the presumption of jurisdiction was set out by the Court in *Van Breda*, in the following passage:

> The presumption of jurisdiction that arises where a recognized connecting factor - whether listed or new - applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.[12] [emphasis added]

42. The Court in *Van Breda* provided the following guidance and examples of how one could go about rebutting the presumption of jurisdiction:

> Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.[13]

43. The task of the party seeking to rebut the presumption of jurisdiction is essentially to demonstrate that the connecting factor, when applied to the circumstances of the case,

[12] *Van Breda* at para. 95.
[13] *Van Breda* at para. 96.

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represents a weak relationship between the forum (Ontario) and the subject matter of the litigation. A party who is able to demonstrate that the real and substantial connection test is not met, has rebutted the presumption of jurisdiction. If a party does not seek to rebut the presumption of jurisdiction or fails to rebut the presumption, the court then has jurisdiction and must hold that the action is properly before the Court.[14]

44. In this case, the moving party, has failed to rebut the presumption flowing from my findings with respect to the connecting factors. In addition to my view with respect to the moving parties' reliance on *Haufler* I arrive at this conclusion for the following main reasons.

45. At the criminal trial in Cuba, all of the witnesses except the moving parties were from Cuba. However, this does not undermine or rebut the real and substantial connection between Ontario and this litigation. The criminal trial is not this litigation. This litigation, as cast by the plaintiffs, engages much broader considerations beyond the recklessness or imprudence[15] of Mr. Benhamiche which formed the basis for his conviction in Cuba. This is clear from the fact that the only person on trial in Cuba was Mr. Benhamiche. In contrast, the plaintiffs plead negligence, breach of statutory duties and contractual misrepresentations which are much broader and beyond the issues for which the Cuban witnesses were called at the criminal trial. Accordingly, that the witnesses at the criminal trial were from Cuba is not an indication that the connection between the subject matter of the litigation and Ontario is only a weak one. It is also worth noting that in 2024, a significant portion of the civil matters before this court are dealt with virtually.

46. One other observation - to the extent that the location of witnesses is important, Sani Kovacevic, his son and wife were part of the excursion and witnessed the accident. These individuals reside in Ontario[16].

47. The moving parties also take the position that the contract and the tort both occurred in Cuba and therefore two of the *Van Breda* factors militate in favour of a finding that Cuba is clearly the more appropriate jurisdiction. Respectfully, I disagree. While some arrangements to take the boat excursion took place in Cuba and the accident occurred there, the claim and therefore the litigation is based on the representations and conduct that were a prelude to the conduct in Cuba. This establishes a strong connection between Ontario and this action. Therefore, the moving parties have not discharged their burden to rebut the presumption of jurisdiction.

[14] *Van Breda* at para. 97.
[15] The basis for the finding of imprudence is equally narrow, focusing on Mr. Benhamiche taking his wife and two children aboard a boat that was not fit to carry the associated load. – The Mackintosh Affidavit at para. 32.
[16] The Mackintosh Affidavit at para.49.

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Forum of Necessity Doctrine:

48. Given the findings set out above, the plaintiffs need not rely on the forum of necessity doctrine. Accordingly, I deal with it only briefly here. This doctrine is premised on the notion that there exists no other forum where the plaintiff can reasonably seek relief. In *Van Breda*, the Court explained the doctrine as follows:

> The forum of necessity doctrine recognizes that there will be exceptional cases where, the despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption if jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace "forum of last resort" cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.[17]

49. The plaintiffs' reliance on the case of *Bouzari v. Bahremani*, [2011] O.J. No. 5009, respectfully, is not apt. The doctrine of necessity in that case was premised on a finding that the plaintiff had been tortured in Iran. Moreover, the torture was connected to the defendant. The present case is not remotely akin to those facts which supported the application of the doctrine.

50. However, the circumstances of the present case support the view that it is not reasonable to require that the plaintiffs commence this action in Cuba. Mr. Benhamiche's position is that the Cuban Court had a conflict of interest as related to the company connected to the excursion because of that company's connection to the Cuban government. Mr. Benhamiche takes the view that his trial was merely an administrative formality and that the proceedings lacked impartiality and judicial independence. He cites a lack of confidence in the justice system, in part, based on his view that there was a connection between the prosecuting attorney and the aforementioned Cuban company.

51. Daniel's own interactions were also poor, in particular with respect to his interaction with the legal counsel appointed to him and the Cuban authorities. Daniel's experience consisted of his passport being taken, a lack of understanding of the language which was not ameliorated by the authorities and his feeling of being intimidated by those involved in the administration of justice in Cuba.

[17] *Van Breda* at para. 100.

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52. As indicated, I need not resort to the doctrine of necessity, however, had it been applicable in the circumstances, necessity would have been made out.

The Doctrine of *Forum Non Conveniens:*

53. Although I have concluded that the jurisdiction properly *exists* in Ontario, the defendant moving parties argue that this Court ought not to *exercise* its jurisdiction. This request is distinct from the defendants' argument that the Court has no jurisdiction to deal with the action, an argument that I have found to have failed. Instead, at this stage the defendant moving parties argue that this Court ought not to *exercise* its jurisdiction in this case.

54. This position is premised on the application of the doctrine of *forum non conveniens*. As the Court in *Van Breda* explained, the doctrine of *forum non conveniens* has no application to the issue of whether jurisdiction exists. Put differently, this doctrine is only a consideration once the Court has already found jurisdiction. At that point, the doctrine may be invoked by a party with a view to satisfying a court with jurisdiction to, nonetheless, decline to exercise its jurisdiction and "displace the forum chosen by the plaintiff".

55. Here, the moving party must do more than present an alternative jurisdiction, even one that has some connection to the action. Presenting a jurisdiction that is comparable is not enough. Instead, the moving party bears the burden of demonstrating that the court in the alternate jurisdiction is clearly the more appropriate forum.

56. The moving party has not demonstrated that Cuba is the more appropriate forum. Put differently, Cuba is not in a better position to deal with and dispose of the litigation in a fair and efficient manner. I reach this finding for the following reasons. First, and most importantly, is that if this matter were to be litigated in Cuba, the plaintiffs would not have available to them remedies akin to those that they would in Ontario flowing from the *Family Law Act* R.S.O. 1990, c. F.3. Jennifer's estate would have no claim in Cuba, which would result in a remedy available in Ontario, being unavailable if the litigation were to take place in Cuba. Being barred access to a remedy, should the estate be found to have otherwise been entitled to one, would be an unsatisfactory outcome. Second, while some witnesses are apparently in Cuba, many of the main witnesses are in Ontario and with respect to the moving parties, they reside in Quebec, not Cuba. The Sunwing defendants who are the subject of contractual and tort claims reside in Ontario, not Cuba. Third, the moving parties have no assets in Cuba. Fourth, I have not discounted that there may be witnesses in Cuba that may inform the issues in this litigation. However, as discussed in oral arguments, there are steps that the parties can take to put the evidence of these witnesses before the court.

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57. Finally, the moving parties argue that the Cuban legal system is intelligible. This is difficult to reconcile with the evidence on this motion which includes serious criticism by Mr. Benhamiche leveled at the Cuban legal system. It is noteworthy that these criticisms were not only aimed at the result but on the process, in one instance suggesting the result in his case was a foregone conclusion.

58. The moving parties advanced but did not seriously pursue the argument that Quebec was a more appropriate venue. As indicated elsewhere in these reasons, the only connection between this litigation and Quebec is that the moving parties reside there. To find, on this basis, that Quebec is the more appropriate forum, the Court would have to ignore the circumstances of the other defendant, the pleadings of the plaintiffs and ignore that to find Quebec to be the most appropriate forum would be to require the plaintiffs to split their claim. This Court is not prepared to make such a finding, which would contrary to notions of efficiency and fairness.

59. Having considered these factors, it is my view that not only has the moving party failed to discharge its burden, but I find that in the circumstance of this case, Ontario is clearly the most appropriate form for the disposition of this litigation.

Rule 20 - Summary Judgment:

60. The moving parties seek an order granting summary judgment on the basis that there is no genuine issue requiring a trial regarding the Court's jurisdiction. Specifically, the moving parties' position is as follows:

> The position of These Defendants is that there is no genuine issue requiring a trial on the issue of jurisdiction as this Honourable Court does not have jurisdiction over this claim and therefore, These Defendants respectfully submit that summary judgment shall be granted.[18] [emphasis added]

61. The moving parties do not argue that the merits of the litigation itself such as issues of liability, can be dealt with on a summary judgment motion (with one exception dealt with below). Rather, the moving parties seek summary judgment on the issue of whether this Court has *jurisdiction* over the litigation at all.

62. As the moving parties acknowledged in both their written submissions and in oral argument, whether this Court assesses this matter pursuant to Rule 21.01(3)(a) or through the lens of summary judgment pursuant to Rule 20, the central issue is whether this Court

[18] Factum of the Moving Parties at para. 31.

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has jurisdiction over the litigation and if so whether this Court ought to exercise this jurisdiction. Specifically, the moving parties indicate the following:

> Notwithstanding this point, the legal analysis relating to jurisdiction is the same, whether or not the procedural architecture of Rule 21 or Rule 20 is used. [emphasis added]

63. As indicated in these reasons, I have determined that this Court does have jurisdiction over the action and that this jurisdiction ought to be exercised. The issue of whether the moving parties have standing under Rule 20 aside, my conclusion could not and does not change when viewed through the lens of Rule 20. The moving parties do not suggest otherwise. Accordingly, I have determined that the plaintiffs' claim ought not to be stayed or dismissed.

64. The moving parties argued that should I conclude that there is jurisdiction in this Court to adjudicate this litigation and that this jurisdiction ought to be exercised, I ought to grant summary judgement dismissing the claim against Kahina Bensaadi. The moving parties frame this request in the following way:

> Furthermore, should the claim not be dismissed entirely, the claim ought to be dismissed, under Rule 20, against Kahina Bensaadi, who was only a passenger in the boat in question and therefore against whom there can be no cause of action and thus no genuine issue requiring a trial with respect to her liability.

65. Accordingly, I must first refer to Rule 20.01(3) of the Rules which provides the following:

> A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. [emphasis added]

66. The defendant acknowledges that they have not issued a Statement of Defence in order to avoid attorning to this jurisdiction, and therefore have not complied with the above noted Rule. However, they argue that they have standing and that the Court ought to consider summary judgment in any event. The moving parties rely on *Maurice v. Alles*, 2016 OBCA 287 [*Maurice*], in support of their position that not filing a Statement of Claim in relation to this action is procedural and therefore, not a bar to summary judgement. In this regard, I agree with the plaintiffs' submission that reliance on *Maurice*, is not apt. Most notably, the parties in that case, unlike here, were dealing with an application to which Rule 20 does not apply, however the parties consented to the use of the summary judgment procedure. The circumstances in the present case are different and, in any event, there is no such

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consent of the plaintiffs for the summary judgment procedure to apply notwithstanding non-compliance with Rule 20.01 (3).

67. Moreover, I do not accept that it is appropriate, in this instance, for the Court to consider summary judgment in the absence of a Statement of Defence. The requirement that the Statement of Defence be delivered prior to the defendant being able to move for summary judgment is deliberate on the part of the drafters of the Rules. In this case, that requirement is a meaningful one. The requirement is integral to the ability of the court hearing a motion for summary judgement to give the necessary considerations and make the determinations set out in Rule 20.04. That cannot occur in this instance. As such, the moving parties do not have standing to bring a motion for summary judgment. Accordingly, I decline to deal with the summary judgment aspect of the motion as it is not properly before me, the defendant having failed to deliver a statement of defence.

68. However, if I ought to have considered whether summary judgment is appropriate as it relates to Kahina Bensaadi, I would not have granted summary judgment. Although no affidavit has been provided for Ms. Bensaadi, it appears to be common ground that Ms. Bensaadi was a passenger in the boat that struck and killed Jennifer. However, there are genuine issues for trial related to her participation prior to and in loading the boat with her children and with respect to her own boarding of the boat, which apparently did not have sufficient seating for all four passengers[19]. These are genuine issues requiring a trial.

69. In the circumstances and given the evidentiary record before me or lack thereof, it is not an appropriate case for this Court to proceed under Rule 20.04(2.1). Accordingly, the moving parties' motion for summary judgment, as it relates to claims related to Kahina Bensaadi, is dismissed.

Whether Cuban Law Applies:

70. The moving parties take the position that the present litigation is to be governed by Cuban law, pursuant to the maxim *lex loci delicti*. However, in *Bank of Nova Scotia v. Wassef*, [2000] O.J. No. 4883 (SCJ) at paragraph 17 the Court indicated:

> In the courts of Ontario, as in the courts of most other common law jurisdictions, foreign law (including in Ontario, the laws of other provinces of Canada) must be pleaded by the party relying on the foreign law, as the defendants have done in this action. Unless pleaded, the foreign law is assumed to be the same as Ontario law even if the facts of the case are connected solely with some other jurisdiction. The onus of

[19] The instructions provided were such that only two people were permitted in a boat at a time– The Robineau Affidavit at para. 61.

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> proving that the foreign law is not the same as Ontario law lies on the party who pleads the difference, the defendants in this action. They must satisfy the onus by expert evidence, generally given by legal practitioners or scholars knowledgeable about the law of the foreign jurisdiction. Whether the expert evidence is given orally or by affidavit (subject to the right of cross-examination) is, in my view, a matter of convenience or expense to the parties and not a matter of law…..[emphasis added]

71. In the present case, the moving parties have not provided a statement of defence and accordingly have not plead that Cuban law should apply to this litigation. The moving parties have, however, provided the legal opinion of a purported legal expert. This opinion forms part of the affidavit of Mr. Robineau, who is not the expert in question. Respectfully, Mr. Robineau's short comments related to the expert opinion do little more than introduce the opinion and attach it as an exhibit the affidavit.

72. The portion of the affidavit that is the expert's legal opinion does not conform with Rule 53.03(2.1). In addition, the expert in Cuban law has not been produced for cross-examination. In light of these circumstances, and upon reliance on paragraphs 137-139 of their factum, the plaintiffs urge this Court to find that Ontario law ought to apply to the litigation going forward.

73. In considering the plaintiffs' argument I am mindful that the moving parties not filing a statement of defence and as such not pleading that Cuban law applies, was in connection to the issue of jurisdiction. That is, in their view, to avail themselves of the jurisdictional argument, they could not file their pleadings or risk attorning to the jurisdiction. If I am correct about this, it would seem reasonable to expect that given my decision on the jurisdictional issue, the moving parties would now file a statement of defence. On that basis, I decline to determine the applicable law that applies to this litigation. Should it be necessary to argue that issue, it can be properly and more fulsomely dealt with as a discrete issue once the moving parties have filed their pleadings and once the legal expert has been produced for cross-examination. In my view, proceeding in this fashion aligns best with fairness and is most likely to yield a just result in this case.

Order:

74. The moving parties' motion is dismissed.

Costs:

75. The parties did not make submissions on the issue of costs. If the parties are unable to agree on costs, the plaintiffs may make written submissions to me within 30 days. The defendants (moving parties) shall make written submissions to me within 30 days of receipt of the

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plaintiffs' submissions. The submissions are limited to three pages in length exclusive of any costs outline.

Final Comment*:*

76. For clarity, I am not seized of any remaining issue that I have referred to in this decision.

"Justice J. Perfetto"

Justice J. Perfetto

Released: February 21, 2024

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