COURT OF APPEAL FOR ONTARIO

CITATION: Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada, 2022 ONCA 862
DATE: 20221209
DOCKET: C70281, C70287, C70288, C70289, C70290, C70291, C70292, C70293, C70294, C70295, C70297, C70298, C70300 & C70302

Feldman, Lauwers and Zarnett JJ.A.

DOCKET: C70288, C70290, C70291, C70293, C70295 & C70297

BETWEEN

Vale Canada Limited *et al.*

Plaintiffs

and

Royal & Sun Alliance Insurance Company of Canada *et al.*

Defendants

DOCKET: C70300

AND BETWEEN

Vale Canada Limited *et al.*

Plaintiffs

and

Travelers Casualty & Surety Company *et al.*

Defendants

DOCKET: C70281, C70287, C70289, C70292, C70294, C70298 & C70302

AND BETWEEN

Royal & Sun Alliance Insurance Company of Canada

Plaintiff

and

Vale Canada Limited *et al.*

Defendants

and

Omega General Insurance Company *et al.*

Third Parties

Christopher Hubbard, Hovsep Afarian, Atrisha S. Lewis, Akiva Stern and Alexa Jarvis, for the appellants Vale Canada Limited (f/k/a Inco Limited, f/k/a International Nickel Company Limited), Vale Japan Limited, PT Vale Indonesia Tbk and Vale Europe Limited (C70291); for the appellant Vale Canada Limited (C70292); and for the respondents Vale Canada Limited (f/k/a Inco Limited, f/k/a International Nickel Company Limited), Vale Japan Limited, PT Vale Indonesia Tbk and Vale Europe Limited (C70288, C70290, C70293, C70295 & C70300)

Mark M. O'Donnell and Shernaz Patel, for the appellant Royal & Sun Alliance Insurance Company of Canada (C70294); for the appellant Royal & Sun Alliance

Insurance Company of Canada (f/k/a Royal Insurance Company of Canada) (C70297); and for the respondent Royal & Sun Alliance Insurance Company of Canada (C70281, C70287, C70289, C70298 & C70302)

Douglas Stewart, Deepshikha Dutt and A.J. Freedman, for the appellants Travelers Casualty & Surety Company and St. Paul Mercury Insurance Company (C70281); and for the appellants Travelers Casualty & Surety Company (f/k/a The Aetna Casualty & Surety Company) and St. Paul Mercury Insurance Company (C70300)

Rod McLauchlan, Joshua Henderson, Max Ebrahim and Sally Kim, for the appellant United States Fire Insurance Company (C70293 & C70302); and for the respondent The North River Insurance Company (C70291, C70292, C70294 & C70297)

David C. Rosenbaum, Christopher J. Rae and Mahdi M. Hussein, for the appellant Employers Insurance Company of Wausau (f/k/a Employers Insurance Company of Wausau, A Mutual Company) (C70295); and for the appellant Employers Insurance Company of Wausau (C70298)

Douglas Smith and Sarah Sweet, for the appellants Allstate Northbrook Indemnity Company f/k/a/ Northbrook Indemnity Company and Allstate Insurance Company (f/k/a Northbrook Excess & Surplus Insurance Company) (C70287); for the appellant Allstate Insurance Company (f/k/a Northbrook Excess & Surplus Insurance Company) (C70288); and for the appellant General Reinsurance Corporation (C70289 & C70290)

Dave S. Wilson and Anthony Gatensby, for the respondents Zurich Insurance Company Limited (UK Branch) (as successor to Eagle Star Insurance Company Limited) and RiverStone Insurance (UK) Limited (as successor to Midland Assurance Limited) (C70291); and for the respondents Zurich Insurance Company Ltd. f/k/a Midland Assurance Ltd., Zurich Insurance Company Limited (UK Branch) (as successor to Eagle Star Insurance Company Limited) and RiverStone Insurance (UK) Limited (as successor to Midland Assurance Limited) (C70292)

Heard: September 14-15, 2022

On appeal from the orders of Justice Fred L. Myers of the Superior Court of Justice, dated January 4, 2022, with reasons reported at 2022 ONSC 12.

By the Court:

A. OVERVIEW

[1] These appeals raise the issues of jurisdiction *simpliciter* and *forum non conveniens* in the context of an international insurance coverage dispute centred in one jurisdiction.

[2] A dispute exists between Vale[1], on the one hand, and numerous insurers that issued policies to Vale on the other, about coverage and payment of indemnity for environmental liabilities and defence costs Vale incurred. Vale and one of its primary comprehensive general insurers, RSA[2], started actions in Ontario's Superior Court of Justice to resolve the dispute, immediately after one of the other insurers, Travelers[3], started a lawsuit in the Supreme Court of the State of New York, ostensibly for the same purpose. The point of contention to be determined on these appeals can be simply stated. Vale and RSA take the position that the actions they commenced can and should continue in Ontario; Travelers and its allied insurers take the position that the Ontario actions either cannot, or should not, proceed.

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[1] Vale Canada Limited, formerly named International Nickel Company of Canada Limited and later re-named Inco Limited, is a major Canadian mining company and a wholly owned subsidiary of Vale S.A. For simplicity, we refer to Vale as the insured party regardless of the corporate name on the insurance policies.
[2] Royal & Sun Alliance Insurance Company of Canada ("RSA").
[3] Travelers Casualty & Surety Company ("Travelers").

[3] Ten of the 22 insurers sued by Vale and RSA attorned to Ontario's jurisdiction, but nine insurers (including Travelers) argued that the Ontario court lacks jurisdiction over them in these actions. Alternatively, they asked the court to stay the Ontario actions in favour of New York based on the doctrine of *forum non conveniens*, and were joined in that request by three insurers, Lloyd's of London, Firemans' Fund, and General Reinsurance, who otherwise concede Ontario's jurisdiction over them. The motion judge dismissed the insurers' motions except that of North River Insurance Company, which he allowed.

[4] Vale and RSA argue that by precipitously starting its New York action, Travelers engaged in impermissible forum shopping, in which a party selects a court to decide a dispute based on what that party might perceive to be the advantage of a particular forum. Vale and RSA submit that Ontario has jurisdiction *simpliciter* (even though New York does as well). They further submit that the motion judge found correctly that the insurers did not establish that Ontario is *forum non conveniens* and that New York is the clearly more appropriate forum and incorrectly found that Ontario did not have jurisdiction over North River.

[5] We dismiss the insurers' appeals. We allow Vale's appeal and find that Ontario's Superior Court of Justice has jurisdiction over North River. Vale's appeals of the motion judge's decision concerning Zurich Insurance plc (UK branch) and RiverStone Insurance (UK) Limited are moot because those actions

have been settled. Ontario's Superior Court of Justice has jurisdiction *simpliciter* over the insurers; the insurers did not establish that Ontario was *forum non conveniens* for claims advanced by Vale and RSA in these Ontario actions. The same conclusions apply to North River.

B. ULTIMATE HOLDING

[6] Our ultimate holding can be stated briefly. A comprehensive general liability insurer, underwriting primary or excess insurance coverage for Ontario risks, connects itself to Ontario for jurisdictional purposes and thus commits itself to defending, in Ontario, claims arising out of those risks. No other outcome is commercially reasonable in the operation of the international insurance market and consistent with the principles of comity. There is no place that enjoys universal jurisdiction.

[7] The common law principles of comity underpin the doctrines of jurisdiction *simpliciter* and *forum non conveniens* and stand against forum shopping and the notion that the race should go to the swiftest, for good reason, as we will explain. These principles ensure that Vale, an Ontario-based international miner, can sue its primary, comprehensive general liability insurer RSA, an Ontario-based insurer, in respect of environmental liabilities largely incurred by Vale for polluting Ontario

properties, in Ontario's Superior Court of Justice.[4] These principles also entail the conclusion that Vale and RSA can sue the insurers who provided additional or excess insurance, largely follow-form[5], for the same type of risks, significantly but not exclusively tied to Ontario, in the same court.

[8] Vale is the natural plaintiff in its action against RSA as the claimant under its primary comprehensive general liability policy, and RSA is the natural defendant having the alleged primary obligation to defend and indemnify Vale. Vale is also the natural plaintiff in its claims under its insurance contracts with the excess insurers. In RSA's action, RSA is the natural plaintiff as the primary insurer and Vale's excess and other insurers are the natural defendants. And all of the claims and defences are tied, to a significant degree, to Ontario risks.

[9] We observe that in an ordinary and simple action the insured plaintiff would receive a claim and tender it on its insurer for defence and indemnity. If there were a coverage issue, the insurer would defend the insured's liability claim on a non-waiver basis, leaving the coverage issue to be determined later, and any excess insurer would be engaged as circumstantially required. Or the insured could undertake its own defence, again leaving the coverage issue to be determined

[4] We note that Aviva Insurance Company of Canada, the successor to several other insurers, is a Vale primary insurer, has attorned to Ontario, and was not named in New York.
[5] We accept the description of follow-form excess insurance policies provided in *Allmerica Financial Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621, 87 N.E. 2d 418 (2007).

later. In the coverage litigation, the insurer's defence would be rooted in the pertinent factual details of the insured's liability, the conduct of the insured and the language of the insurance policy. This rootedness of the insurance dispute in the factual circumstances of the insured's liability is crucial to determining jurisdiction.

[10] Although the scenario presented in these appeals is factually more complex, the insurance issues arise out of an ordinary litigation structure in which Vale is the natural plaintiff and its insurers are the natural defendants. This structure cannot be justly or adequately replaced by a suit in which Travelers is the artificial plaintiff and Vale is the artificial defendant in the litigation reconstruction exercise Travelers has undertaken in New York.

C. THE ISSUES

[11] These appeals raise three issues for disposition:

1) Does Ontario's Superior Court of Justice have jurisdiction *simpliciter* over the actions brought by Vale and RSA?
2) Is Ontario's Superior Court of Justice *forum non conveniens* and is the Supreme Court of the State of New York the clearly more appropriate forum for this litigation?
3) What is the appropriate disposition of these appeals?

[12] Before turning to these issues, we describe the events leading to these appeals, the insurance policies at issue, and the current actions in Ontario.

D. EVENTS LEADING TO THESE APPEALS

[13] Over several decades, Vale placed some 92 policies of insurance worldwide with 24 primary and excess insurers. The excess insurance policies were substantially follow-form to primary policies that applied to Vale's mining and other operations in Canada and elsewhere. The insurance policies were occurrence-based and had the potential for long-tail liabilities – liabilities that would not be engaged until beyond the policy periods. Vale asserts that these policies cover its environmental liabilities. RSA and the other insurers dispute such insurance coverage.

[14] Vale has incurred environmental expenditures in relation to 26 sites around the world for which it claims insurance coverage. Of those, 22 sites are in Canada, and 19 are in Ontario. It also has claims for sites operated through subsidiaries in Japan, Indonesia, New Jersey, and Wales.

[15] In Ontario, in particular, Vale incurred costs and losses in six major class actions and putative class actions for environmental damage caused to property in Ontario from operations in Port Colborne and in Sudbury. All these actions are completed now. Vale sought the costs of defence and indemnity for these very

large losses from its primary insurers, including RSA, and, if necessary, from its excess insurers.

[16] Negotiations in New York between Vale and some of its insurers over the scope of coverage under the policies eventually broke down. Travelers stepped away from a stand-still agreement and sued Vale in the New York action. This led to the Ontario actions underpinning these appeals. Travelers and some of the other insurers moved to dismiss or stay the Ontario actions for lack of jurisdiction or alternatively on the basis that Ontario is not the convenient forum. In response to Travelers' New York proceeding, Vale and RSA moved in New York to dismiss Travelers' complaint and other crossclaims against Vale, based on the doctrine of *forum non conveniens*.

[17] On January 4, 2022, the motion judge held that Ontario's Superior Court of Justice largely had jurisdiction *simpliciter* over the Vale and RSA actions and that Ontario was not *forum non conveniens*.

[18] On May 10, 2022, the New York court dismissed the motions by Vale and RSA to dismiss the New York action. The reasons of Borrok J.S.C. stated:

> Dismissal based on *forum non conveniens* pursuant to CPLR §§ 327 and 3211(a)(4) is not appropriate (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 [1984]). Simply put, the movants have failed to sustain their burden in displacing the Plaintiff's choice of forum. As this Court has previously discussed, the critical issue is whether based on the totality of the circumstances New

> York is an inconvenient forum and whether another forum is available which best serves the ends of justice (*Atlantic Mut. Ins. Co. v. Cadillac Fairview US, Inc.,* 125 AD.2d 181, 184 [1st Dept 1986]). This is a dispute involving insurance policies procured in New York, underwritten in New York, issued in New York, delivered to Inco Limited's New York Office (which is the address identified on almost every single policy at issue [NYSCEF Doc. No. 155]), where notice of claims were to be provided in New York and whether coverage exists under those policies. The Canada court in the later filed actions dismissed the claims against North River because it is not subject to jurisdiction in Canada. Wausau also specifically negotiated to exclude Canada risks such that to make them litigate there is particularly inappropriate. Thus, it can not be said that Canada presents the more comprehensive actions. The Commercial Division in New York regularly adjudicates insurance coverage disputes where the events underlying the coverage issue occurred elsewhere, and this Court is often called to interpret foreign law. Indeed, this is part of this Court's jurisdictional mandate. Stated differently, the burden on the Court is small. Given the proximity between Canada and New York, it simply can not be said that the burden on the Defendants is significant.

[19] The decision of Borrok J.S.C. has been appealed and the appeal will be heard shortly.

E. THE ONTARIO LITIGATION

[20] There are three actions before Ontario's Superior Court of Justice. In the action brought first in time, Vale and others sued Travelers in order to respond quickly to Travelers' suit in New York. This action is or will be subsumed in the more comprehensive claim advanced in the second action, in which Vale and

certain of its subsidiaries sue their many insurers for reimbursement of environmental expenses they have incurred. As noted, most of the claimed expenditures relate to six Ontario lawsuits in which Vale was alleged to have caused environmental damage to property in Ontario from its operations in Port Colborne and in Sudbury.

[21] In the third action, RSA, as one of several insurers that provided the primary layer of coverage to Vale for its Canadian liabilities, brought a separate action against all of Vale's insurers seeking interpretation of the respective degrees of responsibility of each of the numerous insurers as among themselves. This action involves not only insurers of liabilities that arose in Ontario. Some of the insurers insured Vale and/or its subsidiaries for expenditures incurred globally so that the determination of their positions vis-à-vis Ontario expenditures might also involve interpretations of the relationships between and among the various insurers in other "towers" of insurance coverage (that is, the multiple layers of insurance coverage put in place for Vale's liabilities in Japan, Indonesia, U.K., and U.S.).

F. ANALYSIS

[22] As a starting point, we comment on international comity – a set of guiding principles underpinning the private international legal order. Based on the customs of mutual deference and respect between nations, "comity attenuates the principle of territoriality": *Spar Aerospace Ltd v. American Mobile Satellite Corp.,* 2002 SCC

78, [2002] 4 S.C.R. 205, at para. 15. The Supreme Court has observed that international comity is at the root of the doctrines of both jurisdiction *simpliciter* and *forum non conveniens*: *Spar Aerospace*, at para. 21.

[23] In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at para. 31, p. 1096, La Forest J. writing for the court, accepted the meaning of "comity" articulated by the Supreme Court of the United States. in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-164:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is 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 ...

[24] La Forest J. also reiterated the Supreme Court's approval in *Zingre v. The Queen*, [1981] 2 S.C.R. 392, of Chief Justice Marshall's statement in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), at para. 31, p. 1097:

> "[C]ommon interest impels sovereigns to mutual intercourse" between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.

[25] La Forest J. went on to note that "[t]he ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world

each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted", citing Arthur T. von Mehren and Donald T. Trautman, "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968) 81 Harv. L. Rev. 1601, at p. 1603. In *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. (Gagnon)*, [1994] 3 S.C.R. 1022, at para. 40, p. 1049, La Forest J. added an important note: "To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions".

[26] Comity rests on the assumption of reciprocity and can be refused where reciprocity is not forthcoming: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at para. 56, p. 934. These principles remain in force. In *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, the court repeated an earlier observation that "ideas of 'comity' are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions": at para. 52.

[27] It is a truism that more than one place may have jurisdiction *simpliciter* over a dispute. And comity has sometimes led Canadian courts to defer (that is, to decline to exercise their own jurisdiction) when a foreign court has accepted jurisdiction.

[28] Two decisions of this court provide a useful example. In *Kaynes v. BP*, *plc*, 2014 ONCA 580, 122 O.R. (3d) 162, leave to appeal refused, [2014] S.C.C.A. No. 452, this court stayed an Ontario class action in favour of a pending class action in the U.S. based on very similar allegations, covering substantially the same period, and embracing the claims of all the BP shareholders. However, when the American class action was dismissed on a procedural motion unrelated to jurisdiction, this court reinstated the Ontario class action: *Kaynes v. BP*, *plc*, 2016 ONCA 601, 133 O.R. (3d) 29.

[29] But comity does not entail that a Canadian court will always defer to a foreign court's decision to take jurisdiction: *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 23.

[30] *Teck Cominco* is in some ways a mirror reflection of this case. Teck Cominco was a Canadian mining company whose operations in British Columbia caused environmental damage in the United States. The environmental damage led to an American class action against Teck Cominco. The company sued its insurers in Washington State after they refused to defend it there. The insurers started a parallel proceeding in British Columbia seeking to clarify their obligations. The American court asserted jurisdiction first and refused the insurers' motion to stay the proceedings in favour of the British Columbia court. The Canadian courts also refused to stay the proceedings. The matter was appealed to the British Columbia

Court of Appeal and then to the Supreme Court. Both courts agreed that an American court's assertion of jurisdiction was not determinative of a Canadian court's decision to stay. We understand that the proceedings in both jurisdictions settled shortly before duplicate trials were to start.

[31] The result in *Teck Cominco* was not ideal because the parties were compelled to litigate in two jurisdictions. However, this outcome is not inconsistent with comity in the Canadian understanding of the concept. We return to *Teck Cominco* in the *forum non conveniens* analysis.

Issue One: Does the Ontario Superior Court of Justice have jurisdiction *simpliciter* over the actions brought by Vale and RSA?

[32] Vale asserts that it is entitled to sue in Ontario. RSA asserts that it is entitled to defend against Vale's insurance claim against it and to sue the excess insurers in Ontario, and to have the court look carefully at evidence of the details of the environmental liabilities incurred by Vale said to give rise to insurance coverage. Vale and RSA assert that Ontario has jurisdiction *simpliciter* over each of their actions, and submit that there is no principled basis on which their entitlement to run their claims and defences as each sees fit should be pre-empted by other insurers whose stake is only derivative and might not ever actually be engaged.

(1) The Governing Principles of Jurisdiction *Simpliciter*

[33] The Supreme Court of Canada explained and described the “real and substantial connection” test, which is the basis on which a Canadian court determines whether to assume jurisdiction over a claim involving foreign parties, in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572.

[34] Before the court were two separate tort claims brought in Ontario by two Canadian residents who suffered injuries while vacationing in Cuba. One of the defendants was Club Resorts Ltd., a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred.

[35] In the *Van Breda* claim, Ms. Van Breda and her spouse, Mr. Berg, stayed at a resort managed by Club Resorts in Cuba. The stay was based on a contractual arrangement whereby Mr. Berg would provide two hours of tennis lessons per day in exchange for a free stay for two people. On the first day of their stay, Ms. Van Breda suffered catastrophic injuries when a metal structure on the beach collapsed on her.

[36] In the *Charron* claim, Dr. Charron and his spouse purchased an all-inclusive vacation package through a local travel agent that included scuba diving. The package was offered by a hotel managed by Club Resorts. On the fourth day of their stay, Dr. Charron drowned while scuba diving.

[37] To determine whether the Ontario courts were correct to assume jurisdiction over the actions and the foreign defendants in each of the two actions, the court established a new analytical framework for applying the real and substantial connection test that had been developed in case law over a number of years. The Supreme Court affirmed the lower court's conclusion that the Ontario court had jurisdiction *simpliciter* over the two actions.

[38] Courts applying the real and substantial connection test are tasked with identifying a link between the forum and the subject matter of the litigation or between the forum and the defendant or both. It is that link that gives the court of the forum jurisdiction over the litigation. Because the court is assuming jurisdiction over a foreign defendant for an event that might not have happened in the forum, the fact that the plaintiff is present in the jurisdiction or suffered damage in the jurisdiction are not in themselves sufficient connecting factors to establish a presumptive real and substantial connection.

[39] The test is informed by the principles of order, fairness and comity among nations. However, those principles are not to be applied on an *ad hoc* basis to the facts of a particular case. The purpose of the new analytical framework was to provide stability and predictability by setting out an objective list of presumptive connecting factors to apply in each case. If one of those factors is present, then,

unless it is rebutted by the defendant, the court will assume jurisdiction, subject to the application of the doctrine of *forum non conveniens*.

[40] The Supreme Court also held that where there are multiple claims in tort or contract and tort, once there is a real and substantial connection for one of the claims, the court must assume jurisdiction over "all aspects of the case": *Van Breda*, at para. 99.

[41] The Supreme Court set out four presumptive connecting factors that apply to tort claims and, *prima facie*, entitle a court to assume jurisdiction over a dispute:

1) The defendant is domiciled or resident in the province;
2) The defendant carries on business in the province;
3) The tort was committed in the province; and
4) A contract connected with the dispute was made in the province.

[42] The Supreme Court also explained that the list is not closed and provided guidance for identifying new presumptive factors for tort and other claims to be based on "connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors": *Van Breda*, at para. 91. Relevant considerations the court identified are:

1) Similarity of the connecting factor with the recognized presumptive connecting factors;
2) Treatment of the connecting factor in the case law;

3) Treatment of the connecting factor in statute law; and

4) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[43] Finally, the court explained that this basis for the assumption of jurisdiction is justified because it is consistent with the principles of order, fairness and comity, at para. 92:

> All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

[44] Because these actions are not tort claims, but actions for the enforcement of insurance contracts, we must consider what presumptive connecting factors should be used to determine whether there is a real and substantial connection between these insurance contract actions and Ontario.

[45] The first consideration is whether the four connecting factors that apply to tort claims might also apply to the breach of contract claims before the court. The main factor considered by the motion judge was the second presumptive

connecting factor set out in *Van Breda*, whether the insurers were carrying on business in Ontario. We will address that factor in detail below.

[46] The second consideration is whether there is case law that identifies relevant presumptive connecting factors for breach of contract claims involving non-Ontario defendants. Two appellate authorities have applied the *Van Breda* factors established for tort cases to breach of contract claims: *Neophytou v. Fraser*, 2015 ONCA 45, 63 C.P.C. (7th) 13; and *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2016 ONCA 977, 135 O.R. (3d) 551. In *Neophytou*, the court assumed jurisdiction on the basis of the fourth *Van Breda* presumptive connecting factor – that a contract connected with the dispute was made in Ontario – over a matter involving a defendant who resided in the United States. And in *Stuart Budd*, the court assumed jurisdiction over the claim on the basis that the defendant, incorporated in British Columbia, carried on business in Ontario.

[47] The third consideration is whether there is statute law that addresses or identifies a relevant connecting factor. Rules 17.02(f) and 17.02(p) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*") – a regulation made under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 – authorize when service of an originating process can be made without a court order on a party outside Ontario in a contract claim. While the *Rules* are procedural, the Supreme Court in *Van Breda* looked with favour on their persuasive import for determining presumptive

connecting factors because “they represent an expression of wisdom and experience drawn from the life of the law”: at para. 83.

[48] Rule 17.02(f) deals with contract claims and allows service outside Ontario in four circumstances: a contract made in Ontario, a contract providing that it is governed by or interpreted in accordance with the law of Ontario, a contract providing that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract (a forum selection clause), and where “a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario.”

[49] The motion judge found that these insurance contracts were not made in Ontario and do not have choice of law or jurisdiction clauses that could support consent-based jurisdiction. However, the last circumstance arguably applies to Vale’s claims that the insurers have breached the contracts by failing to pay the claims to Vale in Ontario.

Private International Law of Other Legal Systems

[50] The fourth consideration is the existence of a recognized connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity. Such a factor exists in U.S. law, which in light of

constitutional guarantees including due process, recognizes specific personal jurisdiction where the defendant has purposefully established “minimum contacts” with the forum state. This connecting factor has particular application to indemnity insurance contracts.

[51] The minimum contacts requirement can be satisfied in two categories of personal jurisdiction, known as “general” jurisdiction and “specific” jurisdiction: *OMI Holdings v. Royal Insurance Co. of Canada*, 149 F.3d 1086, at pp. 1090-1091 (10th Cir. 1998). A court may assert general jurisdiction over a foreign corporation “only when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State’”: *Daimler AG v. Bauman*, 571 U.S. 117, at p. 122 (2014), citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, at p. 919 (2011). Where general jurisdiction is established in the forum, the courts of that forum may take jurisdiction over the defendant even in a case that is unrelated to the forum.[6]

[52] However, specific jurisdiction is established where, although the defendant’s contacts with the forum are limited, they are connected with the plaintiff’s claim in a way that that claim relates to or arises out of the defendant’s contacts with the

[6] This approach differs from Ontario, where jurisdiction over any claim against a foreign defendant may be established as long as the defendant has a presence in the province: *Chevron,* at para. 83. That presence need not be such as to make the province the defendant’s home.

forum. The Supreme Court of the United States in *Bristol Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (U.S. 2017), held that specific jurisdiction requires "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation": at p. 1780, citing *Goodyear*, at p. 919. As demonstrated in *Domtar, Inc. v. Niagara Fire Insurance Co.*, 533 N.W.2d 25 (Minn.), at p. 31 (1995), *cert. denied*, 516 U.S. 1017 (1995), this can include a single insurance contract that is intended to address future consequences which are the real object of the transaction: *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at pp. 478-479 (1985).

[53] *Domtar* considers specific jurisdiction in a factual matrix similar to this appeal – a dispute regarding insurance coverage in the context of environmental damage. In *Domtar*, at p. 31, the Supreme Court of Minnesota stated:

> Several courts have concluded that a court may assert specific personal jurisdiction over a nonresident insurer when (1) the insurer knows of its insured's contact with the forum; (2) the risk insured against transpires in the forum state; and (3) the forum state is not excluded from the geographic coverage of the insurance policy.

[54] As an example, the court cited the decision of the Ninth Circuit Court of Appeals in *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911 (9th Cir. 1990). The case involved a single car accident in Montana. The Canadian owners of the car were passengers while their car was

being driven by an individual insured under an American insurance policy. One of the passengers was injured in an accident that occurred in Montana. The owners were insured by the defendant insurer, Portage La Prairie Mutual Insurance Company, while the driver was insured by a California insurer, Farmers Insurance Exchange. Farmers responded to the owners' claim for damages, but Portage did not pay liability coverage. As a result, Farmers sued Portage in Montana for reimbursement.

[55] The Ninth Circuit Court reversed and remanded the Montana federal district court's decision that it lacked personal jurisdiction over Portage. The Supreme Court of Minnesota in *Domtar* explained the Ninth Circuit Court's reasoning in *Farmers Insurance Exchange*, at p. 32:

> Because Portage's insurance policy coverage extended into Montana, and because an insured event resulted in litigation in Montana, the court concluded that Portage had purposefully availed itself of the privilege of conducting activities in the forum state. The court reasoned that personal jurisdiction over Portage derived from its contractual obligation to indemnify and defend its insured, a duty that foreseeably required litigation in any forum where the insured risk traveled. [Citations omitted.]

[56] Commenting on *Farmers Insurance Exchange*, the Supreme Court of Minnesota observed, at p. 32:

> The approach of asserting personal jurisdiction over insurance companies exemplified by *Farmers Ins. Exch.* faithfully observes the Supreme Court's emphasis in

> contract cases on the future consequences contemplated by the parties when executing the contract. In the general liability insurance context, the parties contemplate that the insurer will defend and indemnify the insured. Further, the defense is presumably contemplated to occur where the insured is sued.

[57] The issue underlying *Domtar* was a remedial investigation of an environmentally contaminated property in Duluth, Minnesota owned by Domtar Inc., a company incorporated in Canada and with its principal place of business located in Montreal, Quebec. Domtar was insured by several primary and excess general liability insurers, including the defendant Canadian General Insurance Company. Domtar sued its insurers in Minnesota seeking declaratory relief and indemnity for investigations costs it incurred. Canadian General was never licensed to do business in Minnesota, had no offices there, owned no property there, and never issued any insurance policy to a Minnesota resident. The jurisdictional issue was whether there were sufficient minimum contacts between Canadian General and Minnesota to allow that forum to assume jurisdiction.

[58] The court looked at Canadian General's underwriting practices and concluded that it would likely have sought to discover the extent of Domtar's operations in the United States before issuing a general liability policy and would have discovered that Domtar formerly operated the contaminated site. Therefore, by issuing the policy, Canadian General "purposefully established the required minimum contacts with Minnesota. Furthermore, Minnesota is the situs of the

accident creating liability that Canadian General purportedly agreed to defend Domtar against": *Domtar*, at pp. 33-34. Minimum contacts supporting an assertion of specific personal jurisdiction were thus established.[7]

[59] Once minimum contacts are established, the court must then ensure that taking jurisdiction accords with the principles of "fair play and substantial justice", which can defeat the reasonableness of taking jurisdiction: see e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, at p. 316 (1945); *Burger King,* at pp. 476-477; *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, at p. 113 (1987).

[60] Such factors as the burden on the defendant to litigate in the forum, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest in furthering substantive social policies, as well as the unique burdens on a foreign defendant in a foreign legal system may be considered: *Burger King*, at p. 477.

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[7] The Minnesota Court of Appeals in *Domtar Inc. v. Niagara Fire Ins. Co*., 2001 WL 988014 (Minn. App.), *review denied* (Nov. 26, 2001) (another Domtar case), considered another claim brought by Domtar seeking insurance coverage and reimbursement from liability insurers, including Allstate Insurance Company of Canada. Unlike Canadian General in the 1995 matter, Allstate was not subject to specific personal jurisdiction in Minnesota. A different result was reached because none of the sites for which Domtar sought coverage from Allstate were located in the forum jurisdiction.

[61] In concluding that it was reasonable for Minnesota to take jurisdiction, the Supreme Court of Minnesota, at p. 34 of *Domtar*, reasoned:

> Canadian General is one of three alleged primary liability insurers for the Domtar tar manufacturing site. Without Canadian General's presence in the present litigation, either Domtar or other insurers will be required to seek contribution from Canadian General in Canada, resulting in piecemeal and fragmented litigation. Moreover, the evidence of contamination, the effectiveness of remediation efforts and the expert witnesses, many of whom will presumably be from the MPCA, are all located in Minnesota. Thus, efficient resolution of this case favors retaining jurisdiction in Minnesota.

[62] In addition, the court took into account that Canadian General was not unduly unfamiliar with the American legal system, and the interests of Minnesota in addressing environmental contamination issues within its state.

The Significance of *Domtar*

[63] On the motion judge's findings, which we summarize in para. 113, the parallels between *Domtar* and the claims before the court are striking. The insurers insuring Vale sites in Ontario with long-tail policies have purposefully established minimum contacts with Ontario, and would have expected and intended that they would be called on to indemnify Vale for liabilities arising from damage caused by activities on those sites and to defend claims for indemnity in Ontario.

[64] In accordance with *Van Breda*, this court may evaluate a new potential presumptive connecting factor through the lens of the values of order, fairness and

comity. The purposeful establishment of minimum contacts by a liability insurer through its insurance contract meets those standards. The fact that the insurer purposefully enters into a liability policy under which it knows it could be called on to respond in the jurisdiction will normally satisfy any concerns regarding fairness and comity.

[65] *Van Breda* also addresses the issue that the policies do not just cover Ontario liabilities, by holding that once a real and substantial connection has been established, the court must take jurisdiction over all aspects of the claim. Again, this accords with the approach and reasoning taken by the Supreme Court of Minnesota in *Domtar*.

[66] Having conducted the analysis mandated by *Van Breda*, we conclude that it is not necessary for the purposes of this case to define a new presumptive connecting factor respecting insurance contracts, in light of our conclusion below that the carrying on business factor determines this case. However, any potential connecting factor should not be assessed in a silo. The factors are to be examined separately and together for the same purpose – to determine if there are sufficient connections between Ontario, the defendant and the claim, to make it reasonable for Ontario to assume jurisdiction.

[67] Activities of a defendant that establish a link to Ontario could be labelled as carrying on business or as establishing minimum contacts, or some other similarly

functional tag. In the end what matters are the activities and their jurisdictional relevance. The concept of carrying on business, already recognized as a presumptive connecting factor, and the concept of establishing minimum contacts can inform each other in the jurisdictional analysis.

(2) The Jurisdiction *Simpliciter* Principles Applied

Introduction

[68] The motion judge found that the Ontario court has jurisdiction over each of Travelers, Northbrook/Allstate, Wausau, St. Paul, and U.S. Fire. He found that each insurer was, at the time the policies were issued, carrying on business in Ontario, a connecting factor that presumptively met the real and substantial connection test for assumed jurisdiction. He found that the presumption had not been rebutted for any of these insurers.

[69] The motion judge also found that the presumptive connecting factor of carrying on business in Ontario was not established for North River, so that the Ontario court had no jurisdiction over North River.

[70] The insurers other than North River argue on various grounds that the motion judge erred in finding jurisdiction over them. Vale, on the other hand, argues that the motion judge erred in not finding that there was jurisdiction over North River.

[71] As noted above, we reject the arguments of the insurers. Moreover, we agree with Vale that the motion judge erred in not finding jurisdiction over North River.

[72] We first address four arguments made by the insurers that apply in a general way to these issues and then turn to the arguments regarding each specific insurer.

General Issues

(a) Is Carrying on Business in Ontario a Presumptive Connecting Factor in a Contract Case?

[73] We first address the argument, made principally by Northbrook/Allstate, that in a contract case, carrying on business in the jurisdiction should not be considered a presumptive connecting factor. According to this argument, *Van Breda*'s use of this factor for tort cases should not be extended to contract cases. If there is neither consent nor presence-based jurisdiction, an Ontario court should only assume jurisdiction in a contract case where the contract was made in Ontario. Northbrook/Allstate therefore submits that the motion judge, having found that the insurance contracts were not made in Ontario, erred in considering carrying on business in Ontario as relevant to the jurisdictional analysis at all.

[74] We do not accept this argument, which is, in any event, inconsistent with this court's decision in *Stuart Budd* referred to above.

[75] The Supreme Court noted in *Chevron,* at para. 91, the specific connecting factors set out in *Van Breda* were designed for tort cases and should not be taken as an inventory covering all claims known to law: "[A]ppropriate connecting factors can reasonably be expected to vary depending on the cause of action at issue". We do not interpret that statement to mean, however, that the factors identified in *Van Breda* cannot be used in other causes of action, just that the mention of a factor in *Van Breda* does not automatically entail that conclusion. Rather, consideration must be given to whether the factor is appropriately applied to another cause of action at all, or in a modified form.

[76] We conclude that carrying on business in Ontario is an appropriate presumptive connecting factor for claims that arise under contracts. The principled basis on which *Van Breda* identified carrying on business in the jurisdiction for use in tort cases also extends to contract cases. But, as we discuss below (see paras. 91-114), the approach to what constitutes carrying on business in Ontario in an insurance contract case might vary from the way that issue might be approached in a tort case.

[77] The presumptive connecting factors identified in *Van Breda* have a common rationale. They are "factors or factual situations that link the subject matter of the litigation and the defendant to the forum": at para. 79. They are "illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction

over a matter … [and] therefore warrant presumptive effect" because, once such a factual situation is established, a court may properly assume jurisdiction on the basis that the real and substantial connection test is met, absent a defendant demonstrating that doing so would be inappropriate: at para. 80. The factors are in part derived from r. 17.02, as discussed above.

[78] The same rationale warrants treating carrying on business in the jurisdiction as a presumptive connecting factor in a contract case. Carrying on business in Ontario might link the subject matter of the litigation and the defendant to Ontario as a forum, even if the contract is not made in Ontario, depending on the relationship between the business activities, the contract, and what the contract and the claim are about. The connection will be especially strong where the business activities give rise to or are reflected in a contract that in whole or in part relates to property, interests, or activities in Ontario, that contemplates some aspect of contractual performance in Ontario, or that is aimed at protecting a person from harm that might otherwise be suffered in Ontario.

[79] This conclusion is reinforced by the fact that r. 17.02(p) permits service outside of Ontario on a defendant who carries on business in Ontario in a contract case as much as it does in a tort case, regardless of where the contract was made. And it is noteworthy that r. 17.02(f)(i) and (iv) permit service out of Ontario where

the claim is in relation to a contract and the contract is either made in Ontario or there was a failure of performance (i.e., a breach) that occurred in Ontario.

[80] If the argument of Northbrook/Allstate were correct that the Ontario court only has jurisdiction over a contractual claim against a non-attorning foreign defendant where the contract was made in Ontario, then the portion of the rule relating to the breach occurring in Ontario would serve no purpose, because even though a foreign defendant could be served out of Ontario, the court would never have jurisdiction over it. This is an additional reason why Northbrook/Allstate's argument must be rejected.

(b) What is The Relevant Time for Assessing Whether the Defendant Was Carrying on Business in the Jurisdiction?

[81] We turn to the argument, made primarily by Travelers, that *Van Breda* requires the defendant to have been carrying on business in Ontario at the time the action was commenced, not at some historical point in time, and that the same temporal approach should apply in a contract case. On Travelers' argument, the fact that it was carrying on business before or at the time it entered into insurance contracts with Vale is irrelevant. All that should matter is whether, on the day Vale started its action, Travelers was carrying on business in Ontario.

[82] We recognize that, for the narrow purpose of determining whether a defendant could be served outside Ontario under r. 17.02(p), the focus would be

on whether the defendant was carrying on business in Ontario at the time of the action's commencement. But we reject, for several reasons, the argument that the same temporal consideration applies to the question of carrying on business as a jurisdictional connector.

[83] First, this argument finds no support in *Van Breda*. That case nowhere states that "carrying on business in the jurisdiction" should be read as "carrying on business in the jurisdiction on the date the action was commenced". Reading in that qualification is contradicted by the actual analysis in *Van Breda*.

[84] When the Supreme Court in *Van Breda* applied the principles it articulated to the actual situation before it, it did not focus on the date on which the action was started. Rather, it focused on whether the defendant, Club Resorts, was carrying on business in Ontario at a historical point in time, namely, before the tort in issue occurred at the holiday destination the plaintiffs, the Charrons, had booked through Club Resorts. The court stated, at paras. 120-122:

> The courts below concluded that the appellant [Club Resorts] had engaged in significant commercial activities in Ontario … before the Charrons booked their holiday. The booking resulted at least in part from those activities in Ontario … The appellant has not demonstrated that the motion judge made any reviewable errors, and deference must be shown to his findings of fact … [which] lead to the conclusion that Club Resorts was carrying on business in Ontario. [Emphasis added.]

[85] Second, we agree with a point made by the motion judge in rejecting this argument. To consider the presumptive connecting factor of carrying on business in Ontario as applicable only if the carrying on business took place on the date the lawsuit was started would render this connecting factor largely redundant with the requirements for presence-based jurisdiction. Presence-based jurisdiction will be established if the defendant has a fixed place of business in the jurisdiction on the date the action is started. But as *Van Breda* makes clear, at para. 79, presence-based jurisdiction is a separate basis for jurisdiction from that of assumed jurisdiction under the real and substantial connection test. Although in *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44, 462 D.L.R. (4th) 642, at paras. 39-40, the Supreme Court did not expressly decide the point, the motion judge properly grasped the suggestion in that case: carrying on business as a presumptive connecting factor for assumed jurisdiction is determined on a different and lower standard than that for presence-based jurisdiction. This supports making a temporal distinction between them.

[86] Finally, in view of the rationale for a presumptive connecting factor, it is apparent that carrying on business in Ontario at the time the defendant entered into or was to perform a contract with the plaintiff would meaningfully connect the defendant and the subject matter to the forum. That connection is not necessarily

lost because, on a freeze-frame snapshot of the situation at the time the action is commenced, the defendant later ceased carrying on business in Ontario.

(c) The Role of Reasonable Expectations

[87] Some of the insurers argue that the motion judge erred in parts of his analysis when he referred to the reasonable expectations of the insurers that they would be called on to answer claims in Ontario. They argue that *Van Breda* precludes that consideration. We disagree.

[88] What *Van Breda* repeated was a caution from a prior case against "building a system of private international law based solely on the expectations of the parties and concerns of fairness in a specific case … A degree of predictability or reliability must be assured": at para. 38 (emphasis added). The motion judge did not suggest he was relying solely on the expectations of the parties. *Van Breda* did not rule out considering reasonable expectations, an objective consideration consistent with predictability and reliability, in the analysis of whether a presumptive connecting factor in a particular case should result in assumed jurisdiction. On the contrary, as the court stated later in its reasons, the real and substantial connection test would not be satisfied where "the presumptive connecting factor points to a weak relationship between the forum and the subject matter of the litigation and … it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction": at para. 97 (emphasis added).

[89] The motion judge pointed out that "[i]f a policy was sold by an insurer who carried on business here at the [relevant] time, the moving insurers cannot have expected that by moving, or transferring the policies to someone outside Ontario, they could escape liability here": at para. 65. He also stated that an insurer who carried on business here created sufficient jurisdictional links "to support a reasonable and frankly, obvious, expectation that they would be called to account on their insurance policies here": at para. 73.

[90] We agree, and see no error in these statements, which are consistent with *Van Breda*.

(d) What Will Constitute Carrying on Business in Ontario in the Insurance Context for Jurisdiction Purposes?

[91] This issue is at the heart of these appeals.

(i) The Issue

[92] Where a tort has occurred outside of Ontario, the inquiry into whether the defendant was carrying on business in Ontario so as to connect it and the subject matter of the claim to Ontario ordinarily focuses on business activities in Ontario that in some way gave rise to a tort that occurred elsewhere. For example, in *Van Breda*, the court looked at business activities in Ontario that led to the plaintiffs booking a vacation in the foreign jurisdiction, Cuba, where the tort happened: at paras. 120-122.

[93] The insurers submit that, like a foreign tort case, the search here must be for activities in Ontario that directly gave rise to the policies sued upon − policies which, on the motion judge's own findings, were not made in Ontario either according to common law or under the definition of an insurance contract made in Ontario in s. 123 of the *Insurance Act,* R.S.O. 1990, c. I.8. They point to the motion judge's findings that the policies were negotiated and delivered (to a Vale address) in New York, and submit that these findings preclude a conclusion that the "carrying on business in Ontario" presumptive connecting factor was applicable. Where an insurer had no activities in Ontario before the policies were issued, they submit that factor could not have been established. They argue for the same result even if the insurer did have activities in Ontario − and even if they were licensed and registered − if the activities that gave rise to the specific policies occurred elsewhere. They submit that any other approach would in essence be an assertion that there is universal jurisdiction in Ontario for claims on policies issued to Ontario residents.

[94] Vale argues for a different approach. Although Vale does not suggest that legislative provisions that require licensing and registration of insurers are, in and of themselves, jurisdiction-conferring, Vale places heavy reliance, as did the motion judge, on the fact that some of the insurers were registered and licensed when the policies were issued, and points to that in support of its position that

those insurers were carrying on business in Ontario for the purpose of a jurisdictional analysis. But Vale also argues that the fact that an insurer was neither licensed nor registered does not mean that they were not carrying on business in Ontario, given the nature of the insurance, the insurance business, and the overall circumstances.

[95] These arguments engage an issue that flows from adopting carrying on business in Ontario as a jurisdictional connecting factor for an insurance contract case. In determining whether an insurer was carrying on business in Ontario in a way that links it and the subject matter of the claim to the forum, what activities constitute carrying on the relevant business? And how does one determine, for jurisdictional purposes, whether the activity occurred "in Ontario"?

[96] *Van Breda* does not define exactly what activities will satisfy the standard of carrying on business in Ontario for a tort claim, let alone for all claims. The question is necessarily contextual, and the answer varies depending on the nature of the business in issue.

(ii) The Motion Judge's Approach

[97] The motion judge adverted to the caution in *Van Breda* "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": para. 60. *Van Breda* counseled against using, in the tort context, advertising in the jurisdiction, or the

availability of website access as the sole basis for finding a jurisdictional connection, and directed the inquiry toward actual rather than virtual activities, giving as examples maintaining an office in the jurisdiction or regularly visiting its territory: at para. 87.

[98] The motion judge looked at the actual activities of the insurers to provide relevant context. He referred to the actual underwriting activities of the defendants, the policies that arose from them, the fact that the policies carried long-tail liabilities, where the liabilities would arise, and the connection of all of that to Ontario. He found that “unless wilfully blind, all of the excess insurers had to have known from their underwriting activities that their policies were part of a global insurance program for a Canadian multi-national company. The policies would necessarily ultimately be received and acted on in Toronto.” He considered “the fact that all of the insurers participated in a global insurance program for an Ontario-based company with its mining assets largely held in Ontario”. This served as “context informing the assessment of whether the various insurers were carrying on business here at the relevant time.”

[99] The motion judge also considered the existence of federal and provincial regimes for registration and licensing of foreign insurers. He concluded correctly that while those legislative schemes did not, in and of themselves, confer jurisdiction, they provided a factual aspect of the analysis for each defendant.

[100] Building on these findings, the motion judge essentially reached two conclusions. First, the appropriate carrying on business in the jurisdiction connection was established for insurers licensed in Ontario and that issued policies that insured Vale's Ontario liabilities (among others). He stated, at para. 75:

> [W]hen a foreign [company] comes to Ontario voluntarily to be licensed to sell insurance to an Ontario resident in relation to Ontario liabilities, and it is sued on those policies in relation to those very liabilities … it is properly found to have been carrying on business here for the purpose of determining whether there is a real and substantial connection between the parties, the issues, and the jurisdiction.

[101] Second, for North River, which he found was not licensed in Ontario at the relevant time, the necessary jurisdictional connection was absent. Finding jurisdiction in such a case would, in his view, mean it existed for any claim by an Ontario resident insured against an insurer who participated in a global insurance program.

(e) Discussion

[102] On this issue we reach the following conclusions. Consistent with the approach of the motion judge, the fact that an insurer chose to register in Canada and/or obtain a licence for insurance-related business activities in Ontario is relevant to, but not determinative of, whether there is a jurisdictional connection to Ontario for claims on a policy that covered Ontario-based liabilities, even where the activities that led to the precise policy in issue occurred elsewhere. But

irrespective of a licence or registration, the issuance of an insurance policy, even if made outside of Ontario, can itself constitute carrying on business in Ontario so as to provide the necessary jurisdictional connection, depending on the location of the object of the insurance and of the performance contemplated under it. In this respect, we take a broader view than did the motion judge.

[103] At a basic level, whether a defendant is carrying on business in Ontario is a question with two parts. First, what activities constitute carrying on the relevant business? Second, where, for jurisdictional purposes, was the business carried on?

[104] Insurance is, in Canada and in Ontario, a regulated enterprise, requiring registration and licensing. According to federal legislation in force when the policies were issued, registration and its related requirements were imposed on any foreign company that "transact[ed] the business of insurance in Canada": *Foreign Insurance Companies Act*, R.S.C. 1970, c. I-16, ss. 2, 4. According to Ontario legislation in the same period, an insurer "undertaking insurance in Ontario or carrying on business in Ontario" was required to obtain and hold a licence: *Insurance Act*, R.S.O. 1970, c. 224, s. 21.

[105] At the relevant times, federal legislation defined the "business of insurance" as making any contract of insurance and to include "any act or acts relating to the performance thereof, or the rendering of any service in connection therewith":

Foreign Insurance Companies Act, s. 2. At the relevant times, the Ontario legislation also viewed the making and performing of an insurance contract to constitute carrying on an insurance business. It defined insurance to mean the "undertaking by one person (the insurer) to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed…": *Insurance Act*, s. 1. It deemed a broad range of activities, each in and of itself, to constitute carrying on the business of insurance in Ontario: *Insurance Act,* s. 20(3). One such activity was "undertaking insurance in Ontario".

[106] The definitions recognize that in the particular case of insurance, the very making of the policy forms an ongoing commercial relationship between the parties with respect to the object of the insurance, requiring various acts in performance including payment and receipt of premiums, notice and investigation of claims, and payment and receipt of indemnity for losses. An insurer carries on business both by making a policy that contemplates acts in performance and by performing under it.

[107] Where a business activity is regulated, how the regulatory scheme defines the activity is a meaningful, although not a conclusive, consideration in deciding, for jurisdictional purposes, if the business activity took place. Just as *Van Breda* treated r. 17.02 as providing relevant input based on the experience of the law, a

statutory definition of what constitutes carrying on business of insurance is a similar input, based on a similar experience.

[108] Although the legislative schemes are helpful in identifying the nature of the activities that constitute carrying on the business of insurance, the legislative schemes do not determine, for the purpose of a jurisdictional analysis, where the business activity took place. In a jurisdictional analysis, the links of the insurance business activity to Ontario are examined to determine whether or not it would be reasonable to expect that the insurer would be called to answer proceedings in Ontario under the policy it issued: *Van Breda*, at para. 96. Once that question is answered, it is unnecessary to go on to consider whether the activity was in Canada, or in Ontario, in the sense necessary to have required the insurer to be registered or licensed. In other words, in performing the jurisdictional analysis, the court is not answering the question of whether the insurer had to be licensed or registered.

[109] Accordingly, where an insurer was registered in Canada and licensed in Ontario at the relevant times, that could be taken as an indicator it was engaged in the type of activities in Ontario that required it to be so registered and licensed, and thus is relevant to the existence of a jurisdictional connector to Ontario.

[110] However, the fact that an insurer was not registered in Canada or licensed in Ontario does not in and of itself mean that, for the purpose of a jurisdictional

analysis, its business activities were not in Ontario in the sense sufficient to connect them and the subject matter of a claim to Ontario. The more important consideration will be the insurance contract itself – the location of the object of the insurance and of contemplated performance, given what the claim is about.

[111] Here, the insurance policies put the parties into long-term relationships because they not only had policy periods of various lengths, but they were occurrence-based and thus created the potential for long-tail liabilities that might not be settled until beyond the policy periods. And, while in general,[8] they insured Vale's liabilities caused by or arising out of occurrences happening anywhere in the world, because a substantial aspect of Vale's operations was in Ontario, they did so primarily as excess insurance to primary policies that applied to Vale's mining and other operations in Canada.

[112] Thus, we agree with the motion judge's approach, except to the extent that he stopped his analysis at what he viewed was a point that required accepting a bald claim to universal jurisdiction over global insurance programs. In our view, finding jurisdiction in this case did not require acceptance of that bald claim.

[113] The motion judge's findings that, regardless of where they were negotiated or delivered, all of the insurers knew that the policies would be received and acted

[8] See the discussion of Wausau and St. Paul, *infra*.

on in Ontario, that “all of the insurers participated in a global insurance program for an Ontario-based company with its mining assets largely held in Ontario”, that the policies related to “Ontario liabilities”, and that the subject matter of the claim involved the insurers being “sued on those policies in relation to those very liabilities” were findings that properly supported the existence of jurisdiction on the basis of carrying on business in Ontario.

[114] As we have noted above, the notion of what constitutes carrying on business as a jurisdictional connector should not be divorced from other characterizations of the same conduct that could equally serve as a jurisdictional connector. We have described above, in paras. 63-67, purposeful conduct by the insurers that, analogizing to the U.S. doctrine of specific personal jurisdiction, could be taken to establish minimum contacts and, on that basis, jurisdiction. Here, the finding that the insurers’ conduct constituted carrying on business in Ontario is sufficient to constitute a jurisdictional connection is reinforced by recognizing that, using the American frame of reference, similar conduct could be sufficient to establish jurisdiction on the basis of that U.S. doctrine.

The Specific Insurers

(1) Travelers

[115] Thirty-one insurance policies were issued by Travelers (which was then known as Aetna Insurance) between 1973 and 1985. For the entire time, Aetna

was licensed in Ontario to carry on an insurance business and maintained offices in Ontario from which to do so. Eight of the policies were issued by Aetna from offices in Toronto and list Vale's Toronto address under "Named Insured".[9] The balance were issued by Aetna from offices in the United States and list Vale's New York address under "Named Insured".

[116] The fact that some policies were issued and delivered in Ontario would support jurisdiction in respect of all of the policies issued by Aetna, even absent other considerations. Jurisdiction over part of a claim equates to jurisdiction over all of it: *Van Breda*, at para. 99.

[117] Leaving that point aside, Travelers' principal argument on appeal is that an action against an insurer can only be brought in Ontario if the defendant is carrying on business in Ontario on the date the action is commenced, without regard to any historical relationship between the insurer and Ontario. As is apparent from our discussion above, we reject that argument. At the time it issued the policies, Travelers was carrying on business in Ontario, as counsel for Travelers fairly conceded. The test for jurisdiction is therefore met. It is unnecessary to address

[9] Although the motion judge appears to have been under the impression that none of the policies were delivered in Ontario, these eight Travelers policies were in fact addressed to Vale in Ontario.

the argument that the motion judge erred in conflating the current presence in the jurisdiction of Travelers' affiliates with a current presence of Travelers itself.

[118] Travelers' appeal from the finding that it is subject to the Ontario court's jurisdiction fails.

(2) U.S. Fire

[119] U.S. Fire issued policies to Vale for the periods 1967-1970 and 1970-1973. It was registered as a foreign insurer under federal legislation for the purpose of transacting insurance in Canada at that time. It was also licensed in Ontario to carry on the business of insurance at the times the policies were issued. It remained licensed through 1992.

[120] The U.S. Fire policies are essentially follow-form policies to those of Vale's primary insurers, one of which was RSA. There is no question that they insure liabilities arising from Vale's Ontario operations.

[121] If U.S. Fire had been sued on the policies shortly after they were issued, the Ontario court would unquestionably have had jurisdiction as it was carrying on business of insurance in Ontario and sold insurance to Vale relating to, in part, liabilities to which it could be subject arising out of its Ontario operations. That same jurisdiction exists even if U.S. Fire subsequently ceased to be registered and licensed.

[122] U.S. Fire's appeal from the finding of jurisdiction fails.

(3) Wausau

[123] Wausau sold policies to Vale between 1981 and 1986. During that time, it was registered in Canada under federal legislation as a foreign insurer, and was licensed in Ontario to carry on the business of insurance. Unlike Travelers, it had no physical office in Ontario.

[124] As noted above, the motion judge reasoned that, at para. 75:

> [W]hen a foreign [company] comes to Ontario voluntarily to be licensed to sell insurance to an Ontario resident in relation to Ontario liabilities, and it is sued on those policies in relation to those very liabilities … it is properly found to have been carrying on business here for the purpose of determining whether there is a real and substantial connection between the parties, the issues, and the jurisdiction.

[125] Wausau's central argument is that while its policies provided comprehensive general liability insurance, an endorsement excluded coverage relating to ownership of, operations at, and goods manufactured at any locations in Canada. Therefore, it argues that the motion judge made a reversible error in suggesting that Wausau's policies were in relation to "Ontario liabilities" and that they had anything to do with what Wausau's Ontario licence permitted.

[126] We do not accept this argument, because it confuses the subject matter of the claim with what might be Wausau's defence to it.

[127] Vale argues that another endorsement in effect overrides or modifies the exclusion, because it reinserts Canada as the policy territory for comprehensive general liability insurance, and has language that contemplates lawsuits against the insured in Canada. Vale argues that it is suing Wausau for liabilities arising out of its Ontario operations, among others.

[128] The subject matter of the litigation therefore includes liabilities arising from Ontario operations, which Wausau is alleged to have issued insurance to cover. Wausau may have a good defence to that aspect of the claim, if it can establish the applicability of the exclusion, and all of the procedural machinery available to obtain early termination of a claim on its merits, such as summary judgment, remain open to it. But whether the defendant has a good defence is a separate issue from whether there is jurisdiction over the defendant, which is assessed on the basis of the subject matter of the claim that the plaintiff asserts: *Chevron*, at para. 94.

[129] Wausau's appeal from the determination that it is subject to the jurisdiction of the Ontario court is dismissed.

(4) St. Paul Mercury Insurance

[130] Two arguments were made on behalf of St. Paul Mercury. First, similar to the argument made on behalf of Travelers about when it was carrying on business in Ontario, St. Paul Mercury submits that the motion judge erred in finding that

Ontario has jurisdiction. Second, although copies of the St. Paul Mercury policies have not yet been found, it appears they relate to claims arising in Indonesia, which further undermines a jurisdictional connection to Ontario.

[131] We reject these arguments. As to the first argument, the reasons we have given with respect to Travelers are sufficient to dispose of it. With respect to the second argument, Vale does not concede that the policies are limited to Indonesia and asserts that it is suing St. Paul Mercury for Ontario liabilities. For the reasons above with respect to Wausau's assertion that it only insured non-Canadian liabilities, we reject this argument.

[132] St. Paul Mercury's appeal from the finding of jurisdiction fails.

(5) Northbrook / Allstate

[133] Northbrook sold one policy to Vale in 1980. It argues that, unlike the other insurers, it was never licensed or registered to sell insurance in Canada or Ontario, never had any physical presence in Ontario, and that its policy was issued from its U.S. address and directed to Vale at its New York office.

[134] In 1985, after the issuance of the Northbrook policy, Northbrook merged with Allstate Insurance Company, an Illinois corporation. Allstate's affiant described the role of Allstate as "successor-in-interest to Northbrook" and therefore "dealing with the matters emanating from the Northbrook book of business."

[135] Northbrook/Allstate's central argument is that none of the reasons the motion judge gave for finding jurisdiction in fact apply to it. In that paragraph of his reasons, the motion judge referred to insurers carrying on business through their own licensure, international operations, or purchase of "Midland policies": at para. 81.

[136] We disagree with Northbrook/Allstate's position. Its reference to the reasons of the motion judge is incomplete. In the same paragraph Northbrook/Allstate relies on, the motion judge goes on to refer to the fact that:

> [Insurers such as Northbrook] had objectively available facts supporting a finding that in selling their policies in issue, they were carrying on business here for the purpose of considering whether there are sufficient links between the defendants and the issues in the lawsuit to support a reasonable expectation that they would be called to account on their insurance policies here.

[137] That finding is justified on the record and is entitled to deference. We also agree with it.

[138] The Northbrook policy relates in part to liabilities from Ontario operations. The policy is excess insurance in a tower of policies that has as part of its foundation the primary RSA policies that were made in Ontario and insure, in part, liabilities arising from Ontario operations, and include the Aetna (now Travelers) policies that also insure Ontario liabilities. Whether or not the Northbrook policy is

pure follow-form, it is excess to and refers to the underlying insurance granted by insurers who are properly subject to the jurisdiction of the Ontario court.

[139] In our view, the motion judge's findings (i) that all of the excess insurers had to have known from their underwriting activities that their policies were part of a global insurance program for a Canadian multi-national company, (ii) that the policies would necessarily ultimately be received and acted on in Ontario, and (iii) that all of the insurers participated in a global insurance program for an Ontario-based company with its mining assets largely held in Ontario, such that they were for Ontario liabilities upon which Vale is now suing, are findings that apply directly to Northbrook and thus to Allstate as successor by amalgamation. Northbrook/Allstate's arguments ignore the strong Ontario connections of the policies themselves, an important aspect of carrying on business for the purpose of a jurisdictional analysis. They support the conclusion the motion judge reached, at para. 81 of his reasons, that in these circumstances the insurers were carrying on the business of insurance in Ontario.

[140] Northbrook/Allstate's appeal from the finding of jurisdiction fails.

(6) North River

[141] In our view, the motion judge did err in concluding that there was no jurisdiction over North River.

[142] North River sold policies to Vale between 1975 and 1985. Although it had previously been licensed in Ontario, it was not at the time it sold these policies.

[143] Nevertheless, the North River policies were excess insurance in a tower which had the RSA primary policies as part of the foundation. They insured liabilities arising out of Ontario operations that might be incurred by an Ontario corporation. The same findings that the motion judge made with respect to Northbrook/Allstate would apply to North River. The motion judge did not explain why, in light of those findings, his conclusion that selling that type of insurance amounted to carrying on business in Ontario sufficient for jurisdiction purposes did not also apply to North River.

[144] In our view, the motion judge's complete reliance on the lack of federal registration or a provincial licence in the case of North River was an error. As he correctly noted, the presence of either would not establish jurisdiction; similarly, the absence of either could not on its own negate it. Similarly, although the motion judge expressed a concern about a claim to universal jurisdiction, based on his own specific findings as to what the excess insurers knew, and what they insured, which he found sufficient for other insurers to justify assuming jurisdiction, there was no risk that accepting jurisdiction over North River would somehow validate a universalist approach to jurisdiction.

[145] Vale's appeal from the finding that there was no jurisdiction over North River must be allowed

Issue Two: Is the Ontario Superior Court of Justice *forum non conveniens* and is the Supreme Court of the State of New York the clearly more appropriate forum for this litigation under the doctrine of *forum non conveniens*?

[146] The common law doctrine of *forum non conveniens* comes into play in these actions and in these appeals because this court has found that Ontario has jurisdiction over the Vale and RSA actions. We begin by setting out some governing principles and then apply the principles to the facts.

(1) The Governing Principles of *Forum Non Conveniens*

[147] Even if the court finds it has jurisdiction *simpliciter*, under the *forum non conveniens* doctrine it may decline to take up an action on the basis that there is another "clearly more appropriate" forum. Jurisdiction *simpliciter* and *forum non conveniens* are both rooted in the principles of comity, but they require distinct analyses: *Van Breda*, at para. 101.

The *forum non conveniens* test

[148] The *forum non conveniens* test was prescribed in *Amchem*. In *Amchem*, Sopinka J. made several pertinent observations. The court must "determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties": at

para. 53, pp. 931-932. He then prescribed the *forum non conveniens* test: "Under this test the court must determine whether there is another forum that is clearly more appropriate" (emphasis added). The implication is that "where there is no one forum that is the most appropriate, the domestic forum wins out by default … provided it is an appropriate forum." Where there is a contest, "the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction." Comity demands the following:

> If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

[149] *Amchem* concerned two actions about asbestos liability, one brought in Texas and the other in British Columbia. In the result, the Supreme Court found on the basis of comity that Texas was an appropriate forum.

[150] The *forum non conveniens* test prescribed in *Amchem* has been consistently applied in the jurisprudence ever since, as recently as *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3, at paras. 3, 27, and elsewhere. In that case, the

court found that Israel was the clearly more appropriate forum for a defamation action.

The *forum non conveniens* burden of proof

[151] The burden of proof is on the party raising the *forum non conveniens* argument to show that the proposed forum is "clearly more appropriate": *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at paras. 23, 37; *Van Breda*, at paras. 103, 109.

Factors relevant in assessing *forum non conveniens*

[152] Experience has established a number of factors that courts consider in assessing *forum non conveniens*. In *Haaretz.com v. Goldhar*, at para. 116, the court adopted the "centre of gravity of the dispute" as a useful metaphor. In our view that metaphor is serviceable in the broader context including this case.

[153] In *Van Breda*, LeBel J. approved the list of factors relevant to assessing *forum non* conveniens from the Uniform Law Commission of Canada's draft *Uniform Court Jurisdiction and Proceedings Transfer Act* ("CJPTA"): at para. 105. The Act has been enacted in several provinces, but not in Ontario. Nonetheless, LeBel J. noted that s. 11(2) of the Act was a good effort to codify the common law in a non-exhaustive way. The factors include:

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

[154] In *Breeden v. Black* the court added, as another factor, "fairness to the parties" which is broader than factor (f) of the Act, "the fair and efficient working of the Canadian legal system as a whole": at para. 35. The appellants moved to dismiss the respondent's defamation actions in Ontario on the ground that there was no real and substantial connection between the actions and Ontario, or, alternatively, on the basis that a New York or Illinois court was the more appropriate forum: at para. 7. The Supreme Court found that "it would be unfair to prevent Lord Black from suing in the community in which his reputation was established" and not unfair to the appellants because "it would have been reasonably foreseeable to them that posting the impugned statements on the internet and targeting the Canadian media would cause damage to Lord Black's reputation in Ontario": at para. 36.

[155] Several cases have raised as a factor the concept of "juridical advantage". In *Breeden v. Black,* the court noted, at para. 27:

> Juridical advantage not only is problematic as a matter of comity, but also as a practical matter, may not add very much to the jurisdictional analysis. As this Court emphasized in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, "[a]ny loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum" (p. 933). Juridical advantage therefore should not weigh too heavily in the *forum non conveniens* analysis. [Emphasis added.]

[156] Finally, forum shopping, while understandable, is unprincipled and is not to be encouraged: *Amchem*, at para. 21, p. 912; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at paras. 36, 49. The Supreme Court noted that "[f]orum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them": *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 36.

Appellate deference is owed

[157] Considerable deference is owed on appeal to a motion judge's discretionary decision to refuse to decline jurisdiction on the basis of *forum non conveniens*. The Supreme Court noted in *Éditions Écosociété Inc.* that "an appeal court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision": at para.

41; see also *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R. 851, at para. 54.

(2) The Principles of *Forum Non Conveniens* Applied

[158] We now turn to the factors relevant to the assessment of whether Ontario is, as the insurers claim, *forum non conveniens*, using the factors described above and taking into account the motion judge's reasons.

(a) The comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum

[159] There is a factual foundation to this case that will require evidence and witnesses as to the facts of Vale's liability, for which it now seeks indemnity from its primary insurers, including RSA, and perhaps ultimately from its excess insurers.

[160] We agree with the motion judge's observations, at paras. 48-49:

> While liability of the insured is a precondition to coverage, it is not correct to submit that the facts underlying the insured's liabilities are no longer relevant in coverage claims. Coverage issues will include assessing whether the environmental liabilities asserted by Vale Canada were accidental occurrences; whether claims for such things as clean-up costs are insured "damages"; what is the proper quantum of each loss claimed; when did each loss occur etc.
>
> All of the insurers will have the same interests as against Vale Canada to minimize insured liabilities. The Ontario-based facts underlying the vast bulk of the Ontario

> insured's insurance claims are central and integral to the issues being litigated.

[161] The focus is on Ontario, as the motion judge noted, at para. 91:

> Vale Canada's action too is tightly tied to this court. The underlying liabilities arose here in litigation and regulatory actions here. The evidence supporting the claims is here. This court is the natural forum for assessment of the laws and practicalities behind all of the various litigation, settlements, regulatory actions, and, most especially, the claims between the Ontario insured and its two Ontario primary insurers.

[162] The motion judge was correct to endorse RSA's argument challenging "the artificiality of the positions advanced by the moving excess carriers to avoid their liabilities that will be premised on an assessment of insurance coverage for an Ontario insured involving principally questions of exhaustion, allocation, and aggregation, among other issues with the Ontario primary insurers": at para. 52.

[163] The insurers argue that because much of the excess insurance was purchased on the international insurance market located there, New York is the clearly preferable forum. More particularly, U.S. Fire argues that New York is clearly the more convenient forum to adjudicate claims against the insurance tower, because New York is the centre of gravity of the insurance tower and the only court with jurisdiction over all insurers in the tower.

[164] This is a revelatory submission because it inferentially posits the excess insurance coverage as the most important issue in this litigation. But, in factual and

insurance terms, this is not correct. Giving effect to it would have the excess insurance “tail” wagging the proverbial primary liability “dog”. The fundamentals of this case are in the Ontario liability and indemnity facts.

[165] Vale’s information and documents about all of the insurance claims for environmental expenditures are primarily, if not exclusively, in Ontario. Witnesses about the expenditure claims are in Ontario (with the exception of four people in Manitoba and one person in New Jersey). There is no Vale employee with personal knowledge of the insurance claims in New York. There is one person in the U.K. with knowledge of the claim related to the refinery in Wales.

[166] This factor favours Ontario in the *forum non conveniens* calculus.

(b) The law to be applied to issues in the proceeding

[167] The Ontario litigation is, as the motion judge found, at para. 89, the “centre of gravity” in the legal disputes among the parties. In our view, the law regarding Vale’s liability is rooted in Ontario. The primary comprehensive general liability policies are rooted in Ontario law respecting the Ontario claims.

[168] We note that the largely follow-form excess insurance policies contain no choice of law provisions. This is explained by the fact that the law triggering Vale’s liability under the policies is both distributed and unknown. It is distributed, in that the insurance was crafted to cover Vale in many jurisdictions around the world. The specifically applicable law is unknown, in that the parties could not know in

advance where indemnifiable liability might alight on Vale, which is, of course, the purpose of insurance. To be clear, we do not say that Ontario law applies to the determination of Vale's liability, for example, in New Jersey, the United Kingdom, or Indonesia. Local law applies to trigger Vale's local liability; the insurance takes into account, in its inferential choice of law, the operative source of Vale's liability. Neither Ontario law nor New York law will apply universally.

[169] Vale's claims extend beyond Ontario and Canada, as do RSA's claims and the claims among the parties *inter se*. Some will require the consideration of foreign law, which is well within the competence and actual practice of the courts in both Ontario and New York.

[170] Given the concentration of the triggers of Vale's liability in Ontario, this factor does not favour New York in the *forum non conveniens* calculus.

(c) The desirability of avoiding multiplicity of legal proceedings

[171] We point out that the Ontario actions are comprehensive and will address all of the issues between the parties.

[172] It is obviously desirable to avoid a multiplicity of legal proceedings, not only to avoid the waste of resources but also because such an eventuality would contradict the basic values of comity. Courts should be able to come to a reasonable accommodation and any failure to do so would be a blot. In this case the motion judge properly decided that the insurers had not established that

Ontario was *forum non conveniens.* That decision was made before the decision of the New York court. Nothing in the New York decision causes us to doubt the motion judge's determination.

[173] As we noted earlier, relying on the Supreme Court's decision in *Teck Cominco*, comity does not entail that a Canadian court automatically defer to a foreign court's decision to take jurisdiction. We noted that *Teck Cominco* is in some ways a mirror reflection of the Vale case.

[174] Recall that Teck Cominco's mining operations in British Columbia caused environmental damage in the United States, leading to an American class action against the company. Teck Cominco sued its insurers in Washington State after they refused to defend it there, but the insurers sued in British Columbia seeking to clarify their obligations. The American court asserted jurisdiction first and refused the insurers' motion to stay the proceedings in favour of the British Columbia court.

[175] The issue for the Supreme Court was whether "where a foreign court has assumed jurisdiction in parallel proceedings, the usual multifactored test under s. 11 of the CJPTA must give way to a 'comity-based' test that respects the foreign court's decision to take jurisdiction": at para. 17. The court rejected this argument. Chief Justice McLachlin stated, "comity is not necessarily served by an automatic deferral to the first court that asserts jurisdiction": at para. 23. It is to be "only one

factor, among many, to be considered in a *forum non conveniens* analysis": at para. 25. She stated, at para. 29:

> Finally, policy considerations do not support making a foreign court's prior assertion of jurisdiction an overriding and determinative factor in the *forum non conveniens* analysis. To adopt this approach would be to encourage a first-to-file system, where each party would rush to commence proceedings in the jurisdiction which it thinks will be most favourable to it and try to delay the proceedings in the other jurisdiction in order to secure a prior assertion in their preferred jurisdiction. Technicalities, such as how long it takes a particular judge to assert jurisdiction, might be determinative of the outcome. In short, considerations that have little or nothing to do with where an action is most conveniently or appropriately heard, would carry the day. Such a result is undesirable…

[176] In the circumstances, the fact that Travelers started the New York lawsuit first carries no weight in the *forum non conveniens* analysis.

[177] Chief Justice McLachlin addressed directly the problem of the parties having to litigate insurance coverage in two jurisdictions. She said: "While I am sympathetic to the difficulties presented by parallel proceedings, the desire to avoid them cannot overshadow the objective of the *forum non conveniens* analysis, which is 'to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties'": at para. 38, citing *Amchem*, at para. 21, p. 912.

[178] New York's assertion of jurisdiction is only one factor in the *forum non conveniens* calculus, but it is not determinative.

(d) The desirability of avoiding conflicting decisions in different courts

[179] It would do no credit to the rule of law or comity for similar proceedings to reach different results in different jurisdictions. That is why this prospect must be avoided where possible. That said, the parties have given us no reason to anticipate that the New York and Ontario courts would reach inconsistent outcomes.

(e) Juridical advantage

[180] We have been shown no juridical advantage rooted in law or procedure, for example, the existence of a different legal test or a limitations defence, that could play a role in the *forum non conveniens* calculus in this instance.

(f) Fairness to the parties

[181] The original language of s. 11(2)(f) of the CJPTA, which works as a reasonable codification of the common law even though it is not in force in Ontario, referred to the need to protect "the fair and efficient working of the Canadian legal system as a whole". The same can equally be said of the need to preserve the proper functioning of the international insurance market and the way that insurance policies covering local risks articulate with local legal systems.

[182] It seems entirely fair to find that a comprehensive general liability insurer, underwriting primary or excess insurance coverage for Ontario risks, carries on business in Ontario for jurisdictional purposes and thus commits itself to defending, in Ontario, claims arising out of those risks. In our view, no other outcome is commercially reasonable in the operation of the international insurance market and consistent with the principles of comity.

(g) The enforcement of an eventual judgment

[183] Chief Justice McLachlin noted the problem of possibly competing judgments in *Teck Cominco*, at para. 39. She also cited the chambers judge's decision not to address the issue on the basis that "it was unlikely that Teck would have to resort to execution proceedings in order to obtain satisfaction from the Insurers": at para. 40. This observation strikes us as equally applicable in this case.

(h) Conclusion on *forum non conveniens*

[184] We have evaluated the factors relevant to the assessment of *forum non conveniens*. These factors all favour Ontario. None favours New York as the "clearly more appropriate" forum. We find no legal error in the motion judge's articulation of the relevant principles or in his factual findings, to which we are obliged to defer.

[185] Bluntly put, the position asserted by the insurers − no actions in Ontario, only Travelers' action in New York − would have some perverse effects. It would

prevent Vale from suing RSA, both Ontario entities, in Ontario's Superior Court of Justice about Ontario-based liabilities under Ontario-based insurance policies. It would prevent RSA from defending against Vale's claims in Ontario. It would oust Vale as the plaintiff in the litigation about its own insurance coverage, in favour of Travelers, an excess insurer that has no contractual relationship with RSA or any of the other insurers, and whose level of coverage might never be reached.

[186] Canadian courts, including this court, have not hesitated to defer to foreign courts, including American courts, where the facts led justly to that outcome. This is not such a case.

Issue Three: What is the appropriate disposition of these appeals?

[187] The outcome of the jurisdiction *simpliciter* analysis, coupled with the assessment of *forum non conveniens*, means the litigation will continue in Ontario. That result is not affected by the possibility that litigation might also continue in New York.

[188] Vale and RSA's appeals of the judgment regarding North River are allowed. Pursuant to counsels' agreement, Vale is entitled to costs for this appeal in the amount of $20,000, and RSA is entitled to costs in the amount of $7,000 payable by North River.

[189] The appeals of General Reinsurance, Allstate Insurance Company, Travelers, St. Paul Mercury Insurance Company, U.S. Fire Insurance Company, and Employers Insurance Company of Wausau are dismissed. Vale is entitled to costs in the amount of $20,000, and RSA is entitled to costs in the amount of $7,000, from each insurer. The costs awards are all inclusive of disbursements and HST.

Released: December 9, 2022 “K.F.”

“K. Feldman J.A.”
“P. Lauwers J.A.”
“B. Zarnett J.A.”