

**SUPREME COURT OF CANADA**

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| **Citation:** Lapointe Rosenstein Marchand Melançon LLP *v.* Cassels Brock & Blackwell LLP, 2016 SCC 30, [2016] 1 S.C.R. 851 | **Appeal heard:** December 3, 2015  **Judgment rendered:** July 15, 2016  **Docket:** 36087 |

Between:

Lapointe Rosenstein Marchand Melançon LLP,

Cabinet juridique Panneton inc., Heenan Blaikie LLP,

Cain Lamarre Casgrain Wells S.E.N.C.R.L., Dunton Rainville S.E.N.C.R.L.,

Jean‑Pierre Barrette, Prévost Fortin D’Aoust S.E.N.C.R.L.,

Dominique Zaurrini, Francis Carrier Avocat inc.,

Parent, Doyon, Rancourt & Associés S.E.N.C.R.L.,

Claude Caron, Gérard Desjardins, Claude Cormier,

Guertin Lazure Crack S.E.N.C.R.L., Luc Boulais avocat inc.,

Lavery, de Billy, LLP, Grenier Verbauwhede Avocats inc.,

Zaurrini Avocats, Louis Riverin, Paul Langevin,

Roy Laporte inc., Norton Rose OR LLP, Girard Allard Guimond Avocats,

Langlois Kronström Desjardins avocats S.E.N.C.R.L., Perreault Avocat,

Cliche Lortie Ladouceur inc., Gilles Lavallée,

Lévesque Gravel & Associés S.E.N.C., Michel Paquin,

Sylvestre & Associés avocats S.E.N.C.R.L. and Nolet Ethier, avocats, S.E.N.C.R.L.

Appellants

and

Cassels Brock & Blackwell LLP

Respondent

**Coram:** McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ.

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| **Reasons for Judgment:**  (paras. 1 to 61)  **Dissenting Reasons:**  (paras. 62 to 146) | Abella J. (McLachlin C.J. and Cromwell, Karakatsanis, Wagner and Gascon JJ. concurring)  Côté J. |

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Nolet Ethier, avocats, S.E.N.C.R.L. Appellants

v.

Cassels Brock & Blackwell LLP Respondent

**Indexed as:** Lapointe Rosenstein Marchand Melançon LLP ***v.*** Cassels Brock & Blackwell LLP

2016 SCC 30

File No.: 36087.

2015: December 3; 2016: July 15.

Present: McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ.

on appeal from the court of appeal for ontario

*Private international law — Choice of forum — Court having jurisdiction — Forum non conveniens — Whether Ontario courts should assume jurisdiction over third party claim brought by Ontario law firm against several law firms located in Quebec in the context of national class action certified in Ontario — If so, whether Ontario courts ought to decline to exercise jurisdiction on ground that court of another jurisdiction is clearly a more appropriate forum for disposing of litigation.*

One of the casualties of the financial crisis in 2008 was the Canadian automotive sector. To assist, the federal government bailed out some of the country’s auto manufacturers in 2009, including General Motors of Canada Ltd. (GM). A term of the government’s bailout of GM was that it close dealerships across the country. Over 200 Canadian dealerships were closed. GM offered compensation to each dealer pursuant to Wind‑Down Agreements. Two hundred and sevenGM dealers who had been closed down started a class action in Ontario, alleging that GM had forced them to sign Wind‑Down Agreements, and that the law firm of Cassels Brock & Blackwell LLP (Cassels Brock) was negligent in failing to provide appropriate legal advice. Cassels Brock added 150 law firms from across the country as third party defendants, seeking contribution and indemnity from the law firms who gave the individual dealers the independent legal advice required under the Agreements. Eighty‑three non‑Ontario law firms challenged Ontario’s jurisdiction, including 32 based in Quebec. The motions judge dismissed the challenge. Only the 32 Quebec law firms appealed. The Ontario Court of Appeal dismissed the appeal.

Held (Côté J. dissenting): The appeal should be dismissed.

*Per* McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner and Gascon JJ.: Before a court can assume jurisdiction over a claim, a real and substantial connection must be shown between the circumstances giving rise to the claim and the jurisdiction where the claim is brought. This Court’s decision in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, sets out the test for establishing the requisiteconnectionin tort claims, and identified four presumptiveconnecting factors. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum where jurisdiction is proposed to be assumed.

This case engages the fourth factor: whether a contract connected with the dispute was made in the province. The fourth factor premises the determination of when a contract will be made in a given jurisdiction on the traditional rules of contract formation. All that is required is a connection between the claim and a contract that was made where jurisdiction is sought to be assumed. A connection does not necessarily require that an alleged tortfeasor be a party to the contract. Nothing in *Van Breda* suggests that the fourth factor is unavailable when more than one contract is involved, or that a different inquiry applies in these circumstances. Nor does *Van Breda* limit this factor to situations where the defendant’s liability flows immediately from his or her contractual obligations. It is sufficient that the dispute be connected to a contract made in the province or territory where jurisdiction is proposed to be assumed. This merely requires that a defendant’s conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract. The fact that another forum may also be connected with the dispute does not undermine the existence of a real and substantial connection.

The first step is identifying the dispute. The nucleus of the claim against Cassels Brock, as well as that of Cassels Brock’s third party claim against the local lawyers who signed certificates of independent legal advice, relates to the claims that there was negligent legal advice about the Wind‑Down Agreements. The dispute is therefore a tort claim for professional negligence.

The next question is whether a contract connected with this dispute was made in Ontario. The contract connected with this dispute is the Wind‑Down Agreement, which is clearly connected to Cassels Brock’s third party claims against the local lawyers. Valid acceptance of GM’s offer required that each individual dealer obtain independent legal advice. The local lawyers’ provision of legal advice brought them within the scope of the contractual relationship between GM and the dealers.

In Ontario, a contract is formed based on an offer by one party, accepted by the other, or an exchange of promises, supported by consideration. Where the contracting parties are located in different jurisdictions, the contract will be formed in the jurisdiction where the last essential act of contract formation, such as acceptance, took place. Here, the contract in question was made in Ontario. The last act essential to contract formation occurred at GM’s office in Ontario, where its Vice President of Sales, Service & Marketing accepted and signed the Wind‑Down Agreements that had been signed and returned by the dealers. Other contextual factors demonstrate that the Agreement was made in Ontario: the Agreement expressly provides that it is governed by Ontario law, GM’s head office and the bulk of the affected dealers were located in Ontario, and the business relationships and the litigation are deeply related to Ontario.

Cassels Brock has therefore demonstrated a real and substantial connection between a contract made in the province (the Wind‑Down Agreement) and the dispute (the third party negligence claim). The strength of this connection was not rebutted by the Quebec lawyers. The Ontario courts, therefore, properly assumed jurisdiction over the claim.

Once jurisdiction is established, the party contesting jurisdiction may raise the doctrine of *forum non conveniens*. The burden is on the defendant to demonstrate that a court of another jurisdiction has a real and substantial connection to the claim and that this alternative forum is clearly more appropriate than the one where jurisdiction may be assumed. This threshold will be met where the alternative forum would be fairer and more efficient for disposing of the litigation. It is not sufficient that the alternative forum merely be comparable to the forum where jurisdiction has been found to exist. *Forum non conveniens* is not concerned only with fairness to the party contesting jurisdiction, it is also concerned with efficiency and convenience for the proceedings themselves.

In this case, the third party claims against the other 118 law firms will be heard in Ontario. This strongly weighs against finding that the Quebec courts are a clearly more appropriate forum for the 32 Quebec firms. Allowing the Quebec third party claims to proceed in Ontario along with the 118 other law firms, would clearly be a more efficient and effective solution. Becausethe third party claims involve a significant number of parties and require the mobilization of significant judicial resources,those resources should be allocated and expended with a view to making the litigation quicker, more economical and less complicated. Adjudicating all the third party claims in the same forum avoids the possibility of conflicting judgments and duplication in fact‑finding and legal analysis, and willensure thatthey are resolved in a timelier andmore affordable manner. All of this leads to the conclusion that Ontario should assumejurisdiction over all the third party claims, including those involving the Quebec law firms.

*Per* Côté J. (dissenting): At the heart of this dispute is the fourth connecting factor set out in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, which provides Ontario with presumptive jurisdiction when a contract connected with the dispute was made in the province.

In this case, the relevant Wind-Down Agreements were simply not made in Ontario. Under the law of Ontario, a contract will be considered formed where the last essential act of contract formation takes place — in other words, where final acceptance is notified. Here, GM’s notice of final acceptance was itself an essential condition for the Wind‑Down Agreements to become binding, and was clearly the last essential formative act. In Ontario, acceptance of a contract will be considered notified in the place where it is received. In this case, GM’s notice of final acceptance was transmitted to its Quebec dealers in Quebec. As such, the relevant Wind‑Down Agreements in respect of the Quebec dealers would have been formed in Quebec. Contextual considerations, like the choice of law clause, and the fact that the bulk of the terminated dealers, as well as GM’s head office, are located in Ontario, have nothing to do with where the Quebec dealers’ Agreements were formed. Furthermore, if these considerations are given weight, the parties’ own desires regarding where their contract is formed risk becoming irrelevant.

Even if the Agreements had been concluded in Ontario, they are not connected with these claims in the manner required by *Van Breda*’s fourth connecting factor. This fourth connecting factor only provides jurisdiction over claims where the defendant’s liability in tort flows immediately from the defendant’s own contractual obligations. Indeed, in these kinds of cases, the claim in tort will often resemble a claim in contract. This may occur in cases of concurrent liability, where a defendant’s failure to exercise reasonable skill and care may constitute, at once, both a breach of contract and a tort. This may also occur in cases where a third party beneficiary to a contract has a claim in tort for acts which occurred in the performance — and potential breach — of that contract. In these cases, the defendant’s breach of contract and his tort are indissociable. Indeed, the duty of care the defendant owes stems from his contract. Establishing jurisdiction over these kinds of claims in tort represents the underlying rationale of *Van Breda*’s fourth connecting factor. It is what makes this factor both a defensible and a desirable conflicts rule. This may represent a narrow interpretation, but it reflects the way the fourth connecting factor was described, justified and applied in *Van Breda*.

On this narrow interpretation of *Van Breda*’s fourth factor, the courts of Ontario clearly do not have jurisdiction over Cassels Brock’s third party claims. The only contracts that could possibly be close enough to the dispute are the retainer agreements concluded between the Quebec lawyers and their clients. The Wind‑Down Agreements — the subject of the Quebec lawyers’ legal advice — are simply too remote. The Quebec lawyers were never brought within the scope of the contractual relationship between GM and the dealers. They were not parties to the Agreements, never owed any obligations under them, were never owed any benefit under them, and are not being sued in tort for actions committed in their performance. Instead, their obligations flow entirely from their retainer agreements. The most that can be said is that the Wind‑Down Agreements contributed to the factual circumstances following which an entirely separate fault or breach occurred.

The majority’s approach to *Van Breda*’s fourth factor misconstrues what it means for a contract to be connected with a claim in tort. The broad scope given to *Van Breda*’s fourth connecting factor by the majority divorces it from its specific and limited foundations. In doing so, this broader approach will lead to jurisdictional overreach. In this case, the requirement of independent legal advice is entirely unrelated to the quality of the legal advice that was obtained in Quebec, and that forms the basis of each claim. Nor can this requirement bring the Quebec lawyers within the scope of the dealers’ contractual relationship with GM. There is also nothing real or substantial about the fact that the allegedly negligent legal advice was about the Wind‑Down Agreement. Every day, lawyers advise clients on contracts that will eventually be formed in another province. If these contracts are a fount of jurisdiction, then such lawyers could be sued for negligence wherever the contracts are entered into.

The majority’s approach also muddies an area of the law that should be kept clear and jeopardizes the certainty and predictability that was promised by *Van Breda*’s purposefully specific connecting factors. On a more restrained approach, it should always be clear when the fourth connecting factor can serve as a basis for jurisdiction. By contrast, the majority’s approach amounts to an open invitation for litigants to engage in long‑winded jurisdictional debates, since the words “connected with” and “connection” are notoriously flexible and fact‑specific.

There may also be harmful commercial implications that flow from the majority’s broader approach to the fourth connecting factor, as well as negative repercussions on the practice of law itself. The majority’s holding means that whenever a lawyer’s advice is required before his client can accept an offer, that lawyer may later be sued for professional negligence wherever the resulting contract is formed, regardless of where his services were provided. Such lawyers may feel conflicted, since they will likely have a personal stake in where their client’s contract is entered into.

With respect to the claims against the two national law firms which have offices both in Quebec and in Ontario, whatever jurisdiction the courts of Ontario have over these claims should be declined on the basis of *forum non conveniens*. It is clear that Quebec is the more appropriate forum for the third party claims against the two national law firms. If these claims were heard in Ontario, the lawyers and witnesses involved, who are all residents of Quebec, would all have to travel to testify, incurring significant costs. Furthermore, since Quebec law will govern the claims against the national law firms with offices in Quebec, additional costs would be incurred to provide an Ontario court with expertise on Quebec law. Finally, if the claims against the Quebec law firms were to be divided between Quebec and Ontario, there is a risk of conflicting decisions.

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By Abella J.

**Applied:** *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; **referred to:** *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Neophytou v. Fraser*, 2015 ONCA 45, 63 C.P.C. (7th) 13; *Eco‑Tec Inc. v. Lu*, 2015 ONCA 818, 343 O.A.C. 140, leave to appeal refused, May 5, 2016, file no. 36825; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, [2007] 3 S.C.R. 679; *Pixiu Solutions Inc. v. Canadian General‑Tower Ltd.*, 2016 ONSC 906; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636; *Currie v. McDonald’s Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *Association des parents de l’école Rose‑des‑vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

By Côté J. (dissenting)

*Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *Serra v. Serra*, 2009 ONCA 105, 93 O.R. (3d) 161; *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409, leave to appeal refused, [2000] 1 S.C.R. xi; *Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H.*, [1983] 2 A.C. 34; *Inukshuk Wireless Partnership v. 4253311 Canada Inc.*, 2013 ONSC 5631, 117 O.R. (3d) 206; *Christmas v. Fort McKay First Nation*, 2014 ONSC 373, 119 O.R. (3d) 21; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Earl v. Wilhelm*, 2000 SKCA 1, 183 D.L.R. (4th) 45; *White v. Jones*, [1995] 2 A.C. 207; *Whittingham v. Crease & Co.* (1978), 88 D.L.R. (3d) 353; *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69; *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666; *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001; *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2015 ONSC 3824, 30 C.B.R. (6th) 1; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636.

**Statutes and Regulations Cited**

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*Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.

*Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2.

*Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C‑41.1.

*Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7 (not yet in force).

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*Negligence Act*, R.S.O. 1990, c. N.1.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, LaForme and Lauwers JJ.A.), 2014 ONCA 497, 120 O.R. (3d) 598, 53 C.P.C. (7th) 1, 374 D.L.R. (4th) 411, 322 O.A.C. 161, [2014] O.J. No. 3096 (QL), 2014 CarswellOnt 8775 (WL Can.), affirming a decision of Belobaba J., 2013 ONSC 2289, 51 C.P.C. (7th) 419, [2013] O.J. No. 2358 (QL), 2013 CarswellOnt 6666 (WL Can.). Appeal dismissed, Côté J. dissenting.

Jo‑Anne Demers and Jean‑Olivier Lessard, for the appellants.

Peter H. Griffin and Jon Laxer, for the respondent.

The judgment of McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner and Gascon JJ. was delivered by

1. Abella J. — Even if the underlying facts involve another jurisdiction, a Canadian court can, if there is a sufficient connection, assume jurisdiction over a tortclaim. In *Van Breda*,[[1]](#footnote-1) this Court identified four “presumptive connecting factors” to assist in making this determination. This appeal focuses on the fourth factor, whereby jurisdiction can be assumed if a contract connected with the dispute was made in the provincewhere the tortclaim is brought.
2. The specific question in this appeal is whether the Ontario courts should assume jurisdiction over a third party claim brought by an Ontario law firm against several law firms located in Quebec in the context of a national class action.

Background

1. One of the casualties of the financial crisis in 2008 was the Canadian automotive sector. To assist, the federal government bailed out some of the country’s auto manufacturers in 2009, including General Motors of Canada Ltd. A term of the bailout was the requirement that GM Canada close dealerships across the country.
2. Over 200 Canadian dealerships were closed. GM Canada offeredcompensation to each dealer pursuant to Wind-Down Agreements. The Agreements contained the following provisions of particular relevance:

Article 13: “This Agreement is governed by the laws of the Province of Ontario.”

Article 19: “The parties consent and agree that the courts of the Province of Ontario have exclusive jurisdiction to hear and determine claims or disputes between the parties hereto pertaining to this Agreement.”

1. All dealers also had to agree to waive their rights under any and all applicable statutes, regulation or other law, including rights under provincial franchise laws.[[2]](#footnote-2)
2. Attached to each Agreement was a letter dated May 20, 2009, from Marc Comeau, GM Canada’s Vice President of Sales, Service & Marketing, sent from his office in Oshawa, Ontario. It states, in part:

Our offer, as set out in the Wind-Down Agreement, is conditional upon all of the Non-Retained Dealers accepting the offer (the “Acceptance Threshold Condition”)and executing and delivering their respective Wind-Down Agreements to GM Canada on or before May 26, 2009 at 6:00 pm EST (the “End of the Offer Period”). *GM Canada reserves the right, in its discretion, to waive the Acceptance Threshold Condition. Any Wind-Down Agreement signed and returned to GM Canada by the End of the Offer Period will not become effective unless and until GM Canada provides written notice to those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada*. [Emphasis added; emphasis in original deleted.]

1. The letter also included a requirement that each dealer get independent legal advice and a certificate signed by the retained lawyer. The signed certificate was to be attached as an Exhibit to the Wind-Down Agreement:

If you are interested in entering into the Wind-Down Agreement, you should review the Wind-Down Agreement with legal, tax and any other advisors of your choosing. To accept, please request your counsel to complete a certificate of independent legal advice (attached as an Exhibit to the Wind-Down Agreement). Please send the signed certificate together with the executed Wind-Down Agreement by the End of the Offer Period by pdf or fax to your Regional Zone Office Manager . . . with two original signed copies of the Agreement, each with an original signed Certificate, to follow by courier.

1. The signed certificate of independent legal advice had to acknowledge that the lawyer had been retained by the dealer, had read the Wind-Down Agreement, and had fully explained the nature and effect of the Agreement to the dealer, including an explanation of the waivers, releases and indemnification obligations contained in the Agreement. Each dealer, in turn, had to acknowledge on the certificate that he or she had carefully read it.
2. Mr. Comeau sent another letter to the affected dealers 10 days later advising them that because of the high acceptance rate of dealers, GM Canada was waiving the threshold condition that *all* dealers sign the Wind-Down Agreements.
3. Two hundred and sevenGM Canada dealers started a class action against GM Canada in Ontario, alleging that GM Canada had forced them to sign the Wind-Down Agreements in breach of provincial franchise laws. They also alleged that the law firm of Cassels Brock & Blackwell LLP, counsel for the Canadian Automobile Dealers Association, was negligent in the legal advice it gave to the General Motors dealers who were members of the Canadian Automobile Dealers Association and therefore had access to that legal advice.
4. Additionally, the dealers claimed that because Cassels Brock was on retainer to Industry Canada — from whom GM Canada needed funding — at the time it was retained by the Canadian Automobile Dealers Association, it had a conflict of interest.
5. The total amount of damages claimed was $750 million.
6. The class action was certified by Strathy J. in 2011. The Ontario Court of Appeal refused leave to appeal the certification in 2012.
7. Relying on rule 29 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the *Negligence Act*, R.S.O. 1990, c. N.1, Cassels Brock added 150 law firms as third party defendants. Sixty-seven were based in Ontario, 32 in Quebec, and 51 in the 8 remaining provinces— 19 in Alberta, 7 in Nova Scotia, 6 in each of British Columbia, Saskatchewan and Manitoba, 5 in New Brunswick, and 1 in each of Newfoundland and Labrador and Prince Edward Island. Six of these firms were national and had offices in Ontario.
8. The basis for the third party claims was that if Cassels Brock was found to be negligent in failing to provide appropriate legal advice, it was seeking contribution and indemnity from the third party law firms who gave the individual dealers independent legal advice.
9. The 32 law firms based in Quebec, and, separately, the other 51 non-Ontario law firms, claimed in two motions that because they were not domiciled or resident in Ontario and did not carry on business there, there was an insufficient connection between the third party claims and the Ontario courts. Nor did they give any legal advice in Ontario. Alternatively, they argued that even if the Ontario courts had jurisdiction, they ought to decline to exercise it based on *forum non conveniens*.
10. Belobaba J. dismissed the motions.[[3]](#footnote-3) In his view, the fourth *Van Breda* factor was met because there was a “real and substantial connection” between a contract made in the province (the Wind-Down Agreement) and the dispute (between Cassels Brock and the local lawyers).
11. Belobaba J. based this conclusion on the fact that the Wind-Down Agreement expressly addressed the issue of the provision of legal advice. Any lawyer reviewing the Agreement would have known from the Agreement that it was governed by Ontario law and that all disputes were to be litigated in Ontario. More importantly, the Wind-Down Agreement itself contemplated and required the involvement of local lawyers: it required each dealer to obtain independent legal advice about the Agreement, and obliged the lawyer providing the advice to sign a certificate confirming the lawyer had read the Agreement and explained its nature and effect to the dealer. As a result, while the lawyers were not parties to the Wind-Down Agreement, they were brought within the scope of this contractual relationship by providing legal advice to the dealers. Finally, the third party tort claim deals squarely with the provision and adequacy of the local lawyers’ legal advice. It should not, as a result, “surprise the local lawyers if they were added as third parties to the Ontario class action that was brought by their clients. Indeed it would be crazy for [Cassels Brock] not to do so.”
12. Belobaba J. also refused to accede to the invitation to decline jurisdiction on the basis of *forum non conveniens*. Thirty-two law firms were based in Quebec and the 51 remaining firms were “scattered” across the other 8 provinces.
13. He relied on*Breeden v. Black*, [2012] 1 S.C.R. 666, released the same day as *Van Breda*, and summarized the test as follows:

When defendants are scattered over a number of jurisdictions and only one forum can be selected, the forum selected by the plaintiff can only be displaced if the defendants can point to an alternative forum that is “clearly more appropriate”. [para. 48]

1. Since Cassels Brock’s third party action against the 67 Ontario-based law firms was already proceeding in Ontario, Belobaba J. concluded that it “cannot be seriously maintained” that Quebec, with only 32 firms, or Alberta, with only 19, were “clearly more appropriate” forums.
2. Only the 32 Quebec law firms appealed Belobaba J.’s judgment. Lauwers J.A. agreed with Belobaba J.[[4]](#footnote-4) Heconfirmed that the Wind-Down Agreement is the relevant contract in applying the fourth *Van Breda* factor to these third party actions. He also agreed that the Agreement was formed in Ontario and was governed by Ontario law. The real and substantial connection between the third party actionsand the Agreement was also clear. While recognizing that satisfying the procedural requirements for third party claims does not necessarily give rise to a real and substantial connection for the purpose of jurisdiction, in this case there was an “integral relationship” between the Wind-Down Agreements, the retainers between the local lawyers and the Quebec class members, the advice the local lawyers gave, and the certificates of independent legal advice they were obliged to sign.
3. The Court of Appeal also agreed that jurisdiction should not be declined on the basis of *forum non conveniens*. Because only the 32 Quebec law firms appealed, almost 120 law firms were going to have their cases determined in Ontario. This made it hard to accept that Quebec was a “clearly more appropriate” forum than Ontario, where all the other third party defendants were going to litigate what were essentially common defences.
4. For the following reasons, I would dismiss the appeal.

Analysis

1. Before a court can assume jurisdiction over a claim, a “real and substantial connection” must be shown between the circumstances giving rise to the claim and the jurisdiction where the claim is brought: *Van Breda*, at paras. 22-24; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*,[2004] 2 S.C.R. 427, at para. 60; *Tolofson v. Jensen*,[1994] 3 S.C.R. 1022, at p. 1049; *Hunt v. T&N plc*,[1993] 4 S.C.R. 289, at pp. 325-26 and 328; *Morguard Investments Ltd. v. De Savoye*,[1990] 3 S.C.R. 1077,at pp. 1108-10.
2. This Court’s decision in *Van Breda* sets out the refined and revised test for establishing the requisiteconnectionin tort claims. Writing for a unanimous Court, LeBel J. identified four non-exhaustivepresumptiveconnecting factors:
3. The defendant is domiciled or resident in the province;
4. The defendant carries on business in the province;
5. The tort was committed in the province; or
6. A contract connected with the dispute was made in the province.
7. As LeBel J. noted, “[a]ll presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum” where jurisdiction is proposed to be assumed: para. 92. The existence of this relationship makes it “reasonable to expect that the defendant would be called to answer legal proceedings in that forum”: para. 92. The burden of establishing the application of a presumptive factor in a given case lies with the party asserting jurisdiction. There is no requirement that more than one factor be shown to apply in a given case.The presumption arising fromeach of these factorsmay be rebutted by the party resisting jurisdiction by showing that there is no real relationship — or only a weak relationship — between the subject matter of the litigation and the proposed forum: paras. 95-100;Joost Blom, “New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet” (2012), 53 *Can. Bus. L.J.* 1, at pp. 9-10 and 14.
8. As *Van Breda* makes clear, the underlying objective of *all* presumptive connecting factors is to pacify the tension between flexibility and predictability, a “constant theme” in the Canadian law of jurisdiction: para. 66; Tanya J. Monestier, “(Still) a ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013), 36 *Fordham Int’l L.J.* 396, at p. 411.
9. Under *Van* *Breda*, predictability is ensured by premising the assumption of jurisdiction on objective, factual connecting factors, giving the parties “reasonable confidence” as to whether jurisdiction will be assumed in a given case: para. 73; Monestier, at pp. 397-98 and 411.
10. Flexibility is ensured by acknowledging “the need for fairness and justice to all parties engaged in litigation” when selecting and applying the presumptive connecting factors: *Van Breda*, at para. 75. In LeBel J.’s view, the list of presumptive connecting factors must be updated “as the needs of the system evolve”: para. 82. *Van Breda* did not purport to set out “a complete code of private international law”; it specifically foresaw that the principles and factors governing jurisdiction would be “developed as problems arise before the courts”: para. 68.
11. The four *Van Breda* factors differ in the way they respectively seek to reconcile flexibility and certainty. The fourth factor promotes certainty by premising the determination of when a contract will be “made” in a given jurisdiction on the traditional rules of contract formation: see Blom, at pp. 16-17; Monestier, at p. 428; *Neophytou v. Fraser* (2015), 63 C.P.C. (7th) 13, at paras. 4-5; *Eco-Tec Inc. v. Lu* (2015), 343 O.A.C. 140, at paras. 16-17.[[5]](#footnote-5) These rules are well known, as are their exceptions, limitations and governing principles. The parties’ ability to tailor these rules and principles also ensures “reasonable confidence” as to when jurisdiction will or will not be assumed under the fourth factor. They can, in other words, determine how and where a given contract will be formed.
12. The fourth factor also promotes flexibility and commercial efficiency. As seen in *Van Breda*, all that is required is a connection between the claim and a contract that was made in the province where jurisdiction is sought to be assumed. A “connection” does not necessarily require that an alleged tortfeasor be a party to the contract. To so narrow the fourth presumptive factor would unduly narrow the scope of *Van Breda*, and undermines the flexibility required in private international law.
13. Flexibility in applying the fourth factor does not amount to jurisdictional overreach. Conflict rules vary from one jurisdiction to another. In Quebec, for example, under art. 3148 of the *Civil Code of Québec*, Quebec authorities have jurisdiction over an action in extra-contractual liability where a fault was committed in Quebec or the injury was suffered there. Nonetheless, under art. 3139, if a Quebec authority has jurisdiction to rule on the principal demand, it would also have jurisdiction to rule on an incidental demand, which could include a third party claim. In a case like the one before us — and subject to any *forum non conveniens* argument — if the main contract had been made in Quebec and governed by the laws of Quebec, Quebec would have jurisdiction not only over Quebec lawyers sued in the principal demand, but also over any Ontario lawyers sued by the Quebec lawyers in third party claims for any professional fault allegedly committed in Ontario by the Ontario lawyers.
14. Further, the real and substantial connection test has never been concerned with showing “the strongest” possible connection between the claim and the forum where jurisdiction is sought to be assumed: *Van Breda*, at para. 34.
15. Nor does the fact that another forum may also be connected with the dispute undermine the existence of a real and substantial connection. *Van Breda* expressly recognized that there will be “situations in which more than one court might claim jurisdiction”: para. 15. However, the question of whether another forum is more appropriate plays no part in the analysis for assuming jurisdiction. This issue is only relevant once jurisdiction has *already* been assumed, and where the defendant seeks to convince the court that the other forum is “clearly more appropriate” under the doctrine of *forum non conveniens*: *Van Breda*, at paras. 101-2.
16. Because thiscase engages the fourth presumptive connecting factor, namely whether a contract connected with the dispute was made in Ontario, it is necessary to identify the dispute.It must then be determined whether the dispute is connected to a contract “made” in the province where jurisdiction is proposed to be assumed: *Van Breda*, at para. 90.
17. The first step is identifying the dispute.
18. The nucleus of the claim against Cassels Brock, as well as that of Cassels Brock’s third party claim against the local lawyers who signed certificates of independent legal advice, relates to the claims that there was negligent legal advice about the Wind-Down Agreements. It cannot therefore seriously be contested that the dispute is a tort claim for professional negligence.
19. The next question is whether a contract connected with this dispute was made in Ontario: *Van Breda*, at para. 90. I agree with the motions judge and with the Court of Appeal that it was. In fact, at the motion stage, the Quebec lawyers conceded that the Wind-Down Agreement was made in Ontario. Only during oral argument before the Court of Appeal did the Quebec lawyers change their position. Buteven in the absence of this concession, no error was made by the motions judge or by the Court of Appeal which would justify this Court’s intervention.
20. In Ontario, a contract is formed based on an offer by one party, accepted by the other, or an exchange of promises, supported by consideration: *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*,[2007] 3 S.C.R. 679, at para. 16; John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 31-32.Where the contracting parties are located in different jurisdictions, the contract will be formed in the jurisdiction where the last essential act of contract formation, such as acceptance, took place: see McCamus, at pp. 77-78; see also S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at paras. 108-9.
21. In this case, the clear conditions of acceptance, as well as the last essential act to contract formation, were set out in the May 20, 2009 letter from Marc Comeau, which was attached to the Wind-Down Agreement:

Any Wind-Down Agreements signed and returned to GM Canada by the End of the Offer Period will not become effective unless and until GM Canada provides written notice to those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada.

1. I agree with the Court of Appeal that the last act essential to contract formation occurred at GM Canada’s office in Oshawa, Ontario, where Marc Comeau accepted and signed the Wind-Down Agreements that had been signed and returned by the dealers.
2. The letter dated May 20, 2009, states that the agreement would take effect when GM Canada “provides written notice” to the terminated dealers who accepted its offer; it did not require that the dealers *receive* the notice for the Agreement to take effect. The notice merely *confirmed* that the conditions for the Agreement to become effective had been met, which means that its receipt in Quebec by the Quebec lawyers does not alter where the Agreement was made. As Lauwers J.A. held, “the stipulated manner in which the [Wind-Down Agreements] would become effective renders inapplicable the general rule that a contract transmitted instantaneously is made in the jurisdiction where acceptance is received”: para. 67. The Wind-Down Agreement was, therefore, “made” in Ontario, the province where the claim was brought.
3. It is worth noting that nothing in *Van Breda* suggests that the fourth factor is unavailable when more than one contract is involved, or that a different inquiry applies in these circumstances. Nor does *Van Breda* limit this factor to situations where the defendant’s liability flows immediately from his or her contractual obligations, or require that the defendant be a *party* to the contract: *Pixiu Solutions Inc. v. Canadian General-Tower Ltd.*,2016 ONSC 906, at para. 28 (CanLII). It is sufficient that the dispute be “connected” to a contract made in the province or territory where jurisdiction is proposed to be assumed: *Van Breda*, at para. 117.This merely requires that a defendant’s conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract: paras. 116-17.
4. The basis of the Ontario courts assuming jurisdiction in *Van Breda* is illustrative. The contract was not made between Ms. Van Breda and the defendant Club Resorts Ltd., it was made between Club Resorts Ltd., an Ottawa travel agent, and Ms. Van Breda’s husband. The travel agent’s business involved finding racquet sport instructors for Club Resorts. Ms. Van Breda’s husband was a squash player. In exchange for a few hours of tennis instruction to hotel guests, he and Ms. Van Breda were given free bed and board at the resort. As a result of serious injuries she suffered during her trip, Ms. Van Breda sued Club Resorts in tort.
5. This Court concluded that the events giving rise to her claim flowed from the relationship created by the contract between Ms. Van Breda’s husband and the Ottawa travel agent. The Court acknowledged that the accident happened at the Cuban hotel managed by Club Resorts, and that Ms. Van Breda’s initial injuries were suffered in Cuba. It also recognized that some of the potential defendants resided there, and that a sufficient connection existed between Cuba and the tort claim to support an action in that jurisdiction: *Van Breda*, at para. 118. Nonetheless, the Court held that the existence of the contract concluded in Ontariowas sufficient to establish a real and substantial connection between the resort and Ms. Van Bredaunder the fourth presumptive connecting factor.
6. Here, the Wind-Down Agreement is clearly connected to Cassels Brock’s third party claims against the local lawyers. As noted, the Agreement itself contemplated and required the involvement of the local lawyers. Valid acceptance of GM Canada’s offer required that each individual dealer return a signed copy of the certificate of independent legal advice. The certificate required the signature of the local lawyer retained by each dealer. The lawyer’s signature attested to his or her having been retained by the dealer, having read the Wind-Down Agreement, and having explained the nature and effect of the Agreement to each dealer. This included an explanation of the releases, waivers and indemnification obligations *contained in the Agreement*. Each lawyer was also required to confirm his or her belief that the client dealer was fully advised about all of these matters.This cannot be divorced from the quality of the legal advice provided, and is inextricable from the third party claim. To use the language of *Van Breda*, the local lawyers’ provision of legal advice brought them within the scope of the contractual relationship between GM Canada and the dealers.
7. Finally, Article 13 of the Wind-Down Agreement expressly provides that the Agreement is governed by Ontario law. Along with the facts that General Motors’ head office was located in Ontario, that the bulk of the affected dealers were also located in Ontario, and that “[t]he underlying structure of the business relationships and the litigation are deeply related to Ontario” (para. 71), Lauwers J.A. found that this too was a contextual factor in demonstrating that the Agreement is a contract made in Ontario.
8. Cassels Brock has therefore demonstrated a real and substantial connection between a contract made in the province (the Wind-Down Agreement) and the dispute (the third party negligence claim). The strength of this connection was not rebutted by the Quebec lawyers.
9. The Ontario courts, therefore, properly assumed jurisdiction over the claim. This makes it unnecessary to accept Cassels Brock’s invitation to recognize a new, fifth presumptive connecting factor relating to class actions, or to determine whether jurisdiction could be assumed under the second *Van Breda* factor.
10. Finding that there is a real and substantial connection does not automatically mean that a court will assume jurisdiction over a claim: *Van Breda*, at paras. 100-102; *Breeden*, at para. 22.Once jurisdiction is established, the party contesting jurisdiction may raise the doctrine of *forum non conveniens*, and attempt to “show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff”: *Van Breda*, at para. 103.
11. The burden is on the defendant to demonstrate that a court of another jurisdiction has a real and substantial connection to the claim and that this alternative forum is “*clearly* more appropriate” than the one where jurisdiction may be assumed: *Breeden*, at para. 37 (emphasis in original); and *Van Breda*, at para. 109 (emphasis added). This threshold will be met where, based on its “characteristics”, thealternative forum “would be fairer and more efficient” for disposing of the litigation: *Van Breda*, at para. 109. It is not sufficient that the alternative forum merely be “comparable” to the forum where jurisdiction has been found to exist: *ibid*. *Forum non conveniens* is not concerned only with fairness to the party contesting jurisdiction; it is also concerned with efficiency and convenience for the proceedings themselves: para. 104.
12. Several non-exhaustive factors were set out in *Van Breda* as being relevant to determining whether *forum non conveniens* should be applied. These may vary depending on the context, and include: the location of the parties and the witnesses; the cost of transferring the case to another jurisdiction; the cost of declining to stay the action; the possibility of conflicting judgments; and the impact of declining jurisdiction on the conduct of litigation or on related parallel proceedings: para. 110.
13. A motions judge’s discretionary decision to refuse to decline jurisdiction on the basis of *forum non conveniens* is entitled to considerable deference on appeal: *Van Breda*, at para. 112. As this Court stated in *Éditions Écosociété Inc. v. Banro Corp.*, [2012] 1 S.C.R. 636, “an appeal court should intervene only if the motion[s] judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision”: para. 41. Errors of law, as well as “clear and serious error[s]” of fact may also give grounds for intervention: *Van Breda*, at para. 112. There were no errors in the motions judge’s conclusion here, let alone any warranting intervention.
14. In my view, the objective facts and factors to be considered in the *forum non conveniens* analysis confirm that the Quebeccourts are not a “clearly more appropriate forum” for the third party claims against the 32 Quebec firms. Following the motions judge’s decision, the Ontario Superior Court of Justice already has jurisdiction over 118 other lawyers or firms, including 67 Ontario-based lawyersadded byCassels Brock’s third party action. The third party claims against the remaining 51 law firmslocated outside Ontario will therefore be heard in Ontario.
15. This strongly weighs against finding that the Quebec courts are a “clearly” more appropriate forum for the 32 Quebec firms, especially in light of “the importance of having claims finally resolved in one jurisdiction”: *Currie v. McDonald’s Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.), at para. 15.
16. Against all this, the key factors on which the Quebec lawyers rely carry, with respect, little weight. Witnesses for the third party claims will, in any event, come from both Ontario and Quebec. Expert evidence on the law applicable to either the contract or the negligence claim will be required no matter where the trial takes place.
17. Moreover, becausethe third party claims involve a significant number of parties and require the mobilization of significant judicial resources,those resources should be allocated and expended with a view to making the litigation quicker, more economical and less complicated: *Sable Offshore Energy Inc. v. Ameron International Corp.*,[2013] 2 S.C.R. 623, at para. 1; *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*,[2015] 2 S.C.R. 139, at para. 78.
18. Allowing the Quebec third party claims to proceed in Ontario along with the 118 other law firms, would clearly be a more efficient and effective solution. Adjudicating all the third party claims in the same forum avoids the possibility of conflicting judgments and duplication in fact-finding and legal analysis. While the third party claims are not class claims, they will, as Lauwers J.A. noted, have much in common:

Given the common elements of the [Wind-Down Agreements], the [certificates of independent legal advice] and the content of Ontario law, it seems to me that the core of the legal advice that ought to have been given by local lawyers will be very similar for each, subject to any relevant differences in the applicable franchise legislation; such differences could still be addressed without resort to individual determinations. Although there may be some variation in the advice actually given and in the terms of the contracts for legal services, there is no reason to think that the case management judge would not be able to create efficient methods for adjudicating these issues, given the tools available under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 25. [para. 86]

1. Overall, therefore, proceeding with all the third party claims before the Ontario courts willensure thatthey are resolved in a timelier andmore affordable manner: *Hryniak**v. Mauldin*, [2014] 1 S.C.R. 87, at para. 28. All of this leads, as it did in the prior proceedings, to the conclusion that Ontario should assumejurisdiction over all the third party claims, including those involving the Quebec law firms.
2. I would dismiss the appeal with costs.

The following are the reasons delivered by

1. Côté J. (dissenting) — In disputes involving an international or interprovincial aspect, jurisdiction is a matter of crucial importance. It must be approached with rigour, or else the cardinal values of order, certainty, and fairness will be jeopardized.
2. In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, this Court outlined four “presumptive connecting factors” which determine whether the courts of Ontario are entitled to assume jurisdiction over a claim in tort. At the heart of this dispute is *Van Breda*’s fourth connecting factor, which provides Ontario with presumptive jurisdiction when “a contract connected with the dispute was made in the province”: para. 90.
3. Analysis
4. This case comes in the wake of events in 2009, when a class action was commenced on behalf of 207 terminated General Motors of Canada Ltd. dealers. The terminated dealers claimed that General Motors had coerced them into signing Wind-Down Agreements in breach of Ontario franchise law, and that the respondent, Cassels Brock & Blackwell LLP, was negligent in providing legal advice to the Canadian Automobile Dealers Association on those Wind-Down Agreements, in addition to being in a conflict of interest.
5. After this class action was certified, Cassels Brock instituted proceedings in Ontario, by way of third party claims, for contribution and indemnity against the 150 law firms that had provided local dealers, within their respective provinces, with independent legal advice on those same Wind-Down Agreements. As pleaded, the underlying cause of action of these third party claims sounds in tort: Cassels Brock alleges that these law firms each provided negligent legal advice to their clients. It is noteworthy that no legal action was brought against these law firms by the local dealers themselves.
6. The law firms based in Quebec, as well as the two national law firms having offices both in Quebec and in Ontario, challenge Ontario’s jurisdiction over the third party claims against them. Cassels Brock argues in response that *Van Breda*’s fourth connecting factor is engaged, since the Wind-Down Agreements were “made in” Ontario and are sufficiently “connected with” these disputes. The Quebec law firms, for their part, argue that the Wind-Down Agreements were not “made in” Ontario and would not, in any event, be sufficiently “connected with” these disputes.
7. I agree with the Quebec law firms on both counts, and would therefore overturn the decisions of the Ontario Superior Court of Justice and the Court of Appeal: see 2013 ONSC 2289, 51 C.P.C. (7th) 419, and 2014 ONCA 497, 120 O.R. (3d) 598.
8. With regards to the first issue, I am of the view that the relevant Wind-Down Agreements, in respect of the Quebec dealers, were “made in” Quebec. The Agreements only became binding contracts once General Motors had provided its terminated dealers with notice that it had waived its “Acceptance Threshold Condition”. Notice of this final acceptance was provided to the Quebec dealers in Quebec and the Agreements for those dealers were therefore formed in that province, and not in Ontario.
9. With regards to the second issue, I am of the view that Cassels Brock has misconstrued what it means for a contract to be “connected with” a claim in tort. Cassels Brock has essentially asked this Court to divorce *Van Breda*’s fourth connecting factor from its limited, underlying rationale, all in the name of a “holistic approach” to jurisdiction. This unduly broad approach will surely result in jurisdictional overreach. What is more, this so-called “holistic approach” will reintroduce persistent uncertainties in an area of the law that has always valued clarity and predictability.
10. Nevertheless, the courts of Ontario have jurisdiction over the remaining claims against the two national law firms with offices in both Quebec and Ontario on the basis of *Van Breda*’s second connecting factor, that the “defendant carries on business in the province”: para. 90. However, I am of the view that whatever jurisdiction the courts of Ontario have over these remaining claims should be declined on the basis of *forum non conveniens*.
    1. Where Were the Wind-Down Agreements “Made”?
11. I am of the view that the Wind-Down Agreements were not “made in” Ontario.
12. Apparently, the Quebec law firms did not dispute the place of formation at first instance. However, leaving aside the possibility of withdrawing such an apparent concession on a question of law or mixed law and fact, this concession should be accorded little weight. Indeed, in the end, it merely reflects one party’s legal opinion: see e.g. *Phipson on Evidence* (15th ed. 2000), at para. 28-11, cited in *Serra v. Serra*, 2009 ONCA 105, 93 O.R. (3d) 161, at para. 111. Moreover, this important and contentious issue — i.e. the place of contract formation — should not be disregarded simply because it was conceded at first instance. After all, this issue was argued before the Ontario Court of Appeal, and Lauwers J.A. considered the argument without hesitation. It was also the subject of a fulsome debate before this Court. It must therefore be addressed.
13. Like my colleague Abella J., I accept that in the present case, the law governing contract formation is the law of Ontario. As such, a contract will be considered formed where the last essential act of contract formation takes place — in other words, where final acceptance is notified: see S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at paras. 108-9.
14. In this case, on General Motors’ instruction, the Quebec dealers returned their signed acceptances of the Wind-Down Agreements to General Motors’ offices in Pointe-Claire, Quebec. However, General Motors had previously outlined certain subsequent conditions that had to be met before the Wind-Down Agreements could become effective. These were described in Article 1 of each Wind-Down Agreement, as well as in a covering letter signed by Marc Comeau, General Motors’ Vice President of Sales, Service & Marketing. The covering letter first states:

Our offer, as set out in the Wind-Down Agreement, is conditional upon all of the Non-Retained Dealers accepting the offer (the “Acceptance Threshold Condition”)and executing and delivering their respective Wind-Down Agreements to GM Canada on or before May 26, 2009 at 6:00 pm EST (the “End of the Offer Period”). GM Canada reserves the right, in its discretion, to waive the Acceptance Threshold Condition. [Emphasis in original deleted.]

1. The covering letter goes on to state that:

Any Wind-Down Agreements signed and returned to GM Canada by the End of the Offer Period will not become effective unless and until GM Canada provides written notice to those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada. [Emphasis added.]

1. General Motors did not receive acceptances from all of its terminated dealers. However, on May 30, 2009, Mr. Comeau notified the terminated dealers by e‑mail that General Motors had decided to waive its acceptance threshold condition and that the Wind-Down Agreements were, as of that moment, effective. Mr. Comeau’s letter to the terminated dealers states as follows:

While not all Non-Retained Dealers accepted our conditional offer, we are very pleased to inform you that a substantial number of the Non-Retained Dealers have accepted GM Canada’s conditional offer to enter into the Wind Down Agreement. This letter will serve as notice pursuant to Section 1 of the Wind Down Agreement that GM Canada is hereby waiving the Acceptance Threshold Condition and, accordingly, the Wind Down Agreement that you executed and delivered to GM Canada shall become effective as of today, May 30, 2009. GM Canada will be executing and delivering to you a fully executed copy of the Wind Down Agreement in the near future for your records.

1. This notice did not merely confirm that General Motors’ conditions had been met. Rather, this notice of final acceptance was itself an essential condition for the Wind-Down Agreements to become binding. Echoing the provisions of the Agreements themselves, Mr. Comeau’s first letter clearly states that each Wind-Down Agreement was not effective “unless and until GM Canada provides written notice to those dealers that the Acceptance Threshold Condition and any other required conditions have been met or have been waived by GM Canada” (emphasis added). In other words, without this notice of waiver — this final acceptance — there is no binding agreement. In this light, General Motors’ notice was clearly an essential act of contract formation. More than that, it was the *last* essential formative act. As Mr. Comeau’s letter on May 30 makes clear, the Wind-Down Agreements became effective as of the date of notice.
2. My colleague is of the view that General Motors’ notice only confirmed that the relevant conditions had been met. With respect, I have difficulty squaring this reading with the express terms of Mr. Comeau’s covering letter and Article 1 of the Wind-Down Agreements, which state that the Agreements will not be effective unless and until this final notice is provided.
3. The only outstanding issue, then, is *where* this notice would have been provided. In Ontario, it is well established that when acceptance of a contract is transmitted instantaneously, acceptance will be considered notified in the place where it is received: *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), at paras. 23 and 27-29, leave to appeal refused, [2000] 1 S.C.R. xi, citing *Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H.*, [1983] 2 A.C. 34 (H.L.); *Inukshuk Wireless Partnership v. 4253311 Canada Inc.*, 2013 ONSC 5631, 117 O.R. (3d) 206, at paras. 25-29; *Christmas v. Fort McKay First Nation*, 2014 ONSC 373, 119 O.R. (3d) 21, at para. 18.
4. In this case, General Motors’ notice of final acceptance was transmitted by e-mail, an instantaneous form of communication, to its dealers in Quebec. As such, the relevant Wind-Down Agreements in respect of the Quebec dealers would have been formed in Quebec — the same province, I would add, where General Motors’ initial offer was received by the Quebec dealers, and where General Motors received the dealers’ signed acceptances. Put simply, these are not contracts “made in” Ontario. They cannot therefore ground jurisdiction for the purposes of *Van Breda*’s fourth presumptive connection.
5. Finally, to support her conclusion that the Wind-Down Agreements were “made in” Ontario, my colleague Abella J. appeals to certain extrinsic “contextual” considerations, like the Wind-Down Agreements’ choice of law clause, and the fact that the bulk of the terminated dealers, as well as General Motors’ head office, are located in Ontario: para. 48. However, these contextual factors have *nothing* to do with where the Quebec dealers’ Agreements were formed. Furthermore, my colleague’s appeal to these extrinsic considerations is at odds with both her view that “[t]he fourth factor promotes certainty by premising the determination of when a contract will be ‘made’ in a given jurisdiction on the traditional rules of contract formation”, as well as her view that the parties to a contract can “determine how and where a given contract will be formed”: para. 31. Indeed, if these contextual considerations are given weight in the analysis, the parties’ own desires regarding where their contract is formed risk becoming irrelevant. This cannot be.
   1. Are the Wind-Down Agreements “Connected With” the Third Party Claims in Tort?
6. Even if the Wind-Down Agreements had been concluded in Ontario, they are not “connected with” these claims for professional negligence in the manner required by *Van Breda*’s fourth connecting factor. In my view, this conclusion is supported by the way the fourth connecting factor was described, justified and applied in LeBel J.’s reasons.
7. At the outset, it is worth distinguishing Cassels Brock’s third party claims from the dispute in *Van Breda*. In that case, a professional squash player, Mr. Berg, had entered into a contract with Club Resorts Ltd. in Ontario through a local representative. The place where the contract was “made” was not in dispute. Club Resorts was to provide Mr. Berg and his wife, Ms. Van Breda, with room and board and other services at the SuperClubs Breezes Jibacoa resort it managed in Cuba. In exchange, Mr. Berg was to provide two hours’ worth of tennis lessons per day for the resort’s other guests. Ms. Van Breda was brought within the scope of this contractual relationship since “[t]he benefit of this contract” was “extended to” her: para. 116. On their first day there, a metal structure collapsed on the resort’s beach, causing Ms. Van Breda to become paraplegic. She later sued Club Resorts in Ontario.
8. In *Van Breda*, there was only *one* contract that was connected to the dispute, the contract concluded in Ontario between Club Resorts and Mr. Berg. This contract was integral to Club Resorts’ liability in tort. The duty of care Club Resorts owed to Ms. Van Breda flowed *immediately* from its contractual obligations towards Mr. Berg. Furthermore, the very same conduct which would have constituted a breach of the Ontario contract — triggering Club Resorts’ liability in contract towards Mr. Berg — would have also constituted a separate tortious act — triggering Club Resorts’ liability in tort towards Ms. Van Breda.
9. For Cassels Brock’s third party claims, the situation is entirely different. Here, there are two kinds of contracts that are involved. First and foremost, there are the retainer agreements between the Quebec dealers and their various legal counsel. Second, there are the Wind-Down Agreements, the subject of the Quebec lawyers’ legal advice. *Van Breda*,concerned as it was with a case featuring only one potentially connected contract, never said — and in my view, cannot be read as saying — that simply *any* contract connected with the dispute can support jurisdiction under the fourth factor.
10. Moreover, the Quebec lawyers were never brought within the scope of the contractual relationship between General Motors and the dealers. The Quebec lawyers were not parties to the Wind-Down Agreements, they never owed any obligations under those Agreements, nor were they owed any benefit under those Agreements, as was the case in *Van Breda*. Instead, their obligations flow entirely from their retainer agreements. As I will discuss below, the fact that these lawyers provided signed independent legal advice certificates does not, on its own, bring them within the scope of the Wind-Down Agreements. The *most* that can be said is that the Wind-Down Agreements contributed to the factual circumstances in which entirely separate faults or breaches — i.e. the provision of negligent legal advice — were alleged to have been committed.
11. This distinction makes all the difference. In my view, the scope of *Van Breda*’s fourth connecting factor should be limited to claims in tort where the defendant’s liability in tort flows immediately from his own contractual obligations, and where that contract was “made in” Ontario. This may represent a narrow interpretation, but it reflects the specific authority this Court relied on in establishing the fourth connecting factor in *Van Breda*.
12. It is worth remembering that this fourth connecting factor describes a basis of jurisdiction that was, at that time, unprecedented: see e.g. V. Black, “Simplifying Court Jurisdiction in Canada”(2012), 8 *J. Priv. Int. Law* 411, at pp. 425-26. Traditionally, the only forum that has subject matter jurisdiction over a claim in tort is the forum where the tort was committed. I am aware of *no* conflicts regime that accepts that a forum has subject matter jurisdiction over a claim in tort simply because a contract “connected with” that claim was formed there. In this vein, one author has called the fourth connecting factor “odd” and “in need of explanation” (Black, at p. 426), while in the present case, the motions judge Belobaba J. said that it lies on a “somewhat shaky foundation”: para. 9.
13. In identifying this fourth connecting factor, LeBel J. relied on only one authority for support, i.e. rule 17.02(f)(i) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: *Van Breda*,at para. 88. LeBel J. recognized that the Ontario rules for service *ex juris* are not conflicts rules *per se*, although he stressed that they “offer guidance for the development of this area of private international law”, since they represent the “experience drawn from the life of the law” and are “generally consistent” with approaches and recommendations to conflicts law made elsewhere: para. 83; see also J. Walker, *Castel & Walker:* *Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 11‑44. However, rule 17.02(f)(i) only provides a basis for service outside of the jurisdiction for claims “in respect of a contract”, and not for any claims in respect of a tort: T. J. Monestier, “(Still) a ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013), 36 *Fordham Int’l L.J.* 396, at pp. 424-26.
14. In my view, LeBel J.’s reliance on rule 17.02(f)(i) — despite the fact that such a rule does not expressly provide a basis for service in respect of a tort claim — reveals the fourth connecting factor’s purpose and limitations: the fourth factor only provides jurisdiction over claims where the defendant’s liability in tort flows immediately from the defendant’s own contractual obligations. Indeed, in these kinds of cases, the claim in tort will often resemble a claim in contract. I expect that this may occur in two kinds of situations, although there may be others.
15. First, there are cases of concurrent liability, where a defendant’s failure to exercise reasonable skill and care may constitute, at once, both a breach of contract and a tort: see e.g. J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 739-40; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12. When a lawyer lacks reasonable care and diligence in advising his client, for instance, he may be liable towards his client in tort, in contract, and under the law of fiduciary obligations. As Cromwell J. observed in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, a claim that a solicitor-client contract was breached for lack of diligence “is essentially a differently labelled repetition of the claim in negligence”: para. 34.
16. If a court can assume jurisdiction over a claim in contract on the basis that the contract that was breached was formed in the jurisdiction, then that same court should also possess jurisdiction over any concurrent claim in tort. After all, as this Court recognized in *Van Breda*, if “a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case”: para. 99.
17. Second, and more importantly, there may be cases where a third party beneficiary to a contract has a claim in tort for acts which occurred in the performance — and potential breach — of that contract: see e.g. A. Swan, *Canadian Contract Law* (2nd ed. 2009), at p. 178.
18. On the basis of what was alleged in the statement of claim, *Van Breda* appears to represent this kind of case. However, such a situation can also occur in the context of providing legal services. For instance, if a solicitor is instructed by a testator to make changes to a will and the solicitor neglectfully fails to make the changes before the testator dies, the would-be beneficiaries may sue in tort: *Earl v.* *Wilhelm*, 2000 SKCA 1, 183 D.L.R. (4th) 45, at paras. 32-42; *White v. Jones*, [1995] 2 A.C. 207 (H.L.), at pp. 259-60 and 265-66; see also *Whittingham v. Crease & Co.* (1978), 88 D.L.R. (3d) 353 (B.C.S.C.).
19. In these cases, the contract is at the very root of the defendant’s liability in tort. The contract does not simply contribute to the factual circumstances in which an entirely separate tort is committed. Rather, the defendant’s breach of contract and his tort are *indissociable*. The duty of care owed to the third party beneficiaries flows immediately from that contractual relationship: *White*,at pp. 274-76, per Lord Browne-Wilkinson, cited approvingly in *Earl*,at paras. 39-41. Moreover, in these cases, the defendant in tort will necessarily be a party to the contract formed in that jurisdiction, further strengthening that forum’s connection to the dispute. Finally, it would fly in the face of order and fairness to allow a party to the contract to sue the defendant in the jurisdiction where the contract was formed, but to deny that same right to the third party beneficiary suing that same defendant in tort.
20. Establishing jurisdiction over these kinds of claims in tort represents, in my view, the underlying rationale of *Van Breda*’s fourth connecting factor. It is what makes this fourth factor both a defensible and a desirable conflicts rule. In this light, it should be clear that this approach to applying the fourth connecting factor is not a retreat from this Court’s holding in *Van Breda*. Instead, it simply clarifies the fourth factor’s meaning and justification.
21. My colleague Abella J. adopts a broader interpretation, one which aligns with the “holistic approach” to jurisdiction urged by Cassels Brock. In my colleague’s view, *Van Breda* recognized an entirely new basis of jurisdiction, one which has no near recognized equivalent in the rules for service *ex juris* or elsewhere. This expansive reading of *Van Breda* simply cannot be reconciled with LeBel J.’s pronouncement that courts can *only* recognize new connecting factors if they are similar to established bases of jurisdiction, if they have been recognized in case law or in statute law, or if they have been recognized as a basis of jurisdiction in the private international law of other similar legal systems: para. 91. To be sure, I believe that this expansive interpretation has other shortcomings as well. I will describe these more fully in the sections below.
22. On the restrained approach I have described above — which in my view represents the only logical path forward — the courts of Ontario clearly do not have jurisdiction over Cassels Brock’s third party claims.
23. The only contracts that could possibly be close enough to the dispute between Cassels Brock and the Quebec lawyers are the retainer agreements concluded between the Quebec lawyers and their clients. The Wind-Down Agreements are simply too remote. The defendants are not parties to the Wind-Down Agreements, nor are they being sued in tort for actions committed in the performance of these Agreements. The most that can be said is that each Wind-Down Agreement contributed to the factual circumstances in which an entirely separate tort was allegedly committed.
24. However, this tort would have been committed in Quebec, by Quebec-based lawyers, harming their Quebec-based clients, in the course of fulfilling their professional obligations which flow from retainer agreements concluded in Quebec. By this, I do not mean to imply that only the forum with the *strongest* possible connection can assume jurisdiction. I simply wish to stress that *none* of the facts underlying this dispute and relating to the defendants’ potential liability occurred in Ontario.
    1. The Broader Approach to Van Breda’s Fourth Connecting Factor
25. It should be clear, by now, that I respectfully disagree with the broad scope given to *Van Breda*’s fourth connecting factor by my colleague Abella J.
26. In my view, this broad and open-ended approach divorces the fourth connecting factor from its specific and limited foundations. In doing so, this broader approach confers jurisdiction in a case where Ontario simply has no real or substantial connection with the dispute. It also muddies an area of the law that should be kept clear and predictable.
    * 1. Jurisdictional Overreach
27. As I have said, this broad and open-ended approach will lead to jurisdictional overreach — in this case, and in others.
28. Under normal circumstances, these claims would have been instituted by the terminated Quebec dealers against their Quebec lawyers, for faults which would have been committed in Quebec, in the course of fulfilling contractual obligations which flow from retainer agreements concluded in Quebec. How could the resulting dispute possibly be connected to the province of Ontario?
29. In response, Cassels Brock has stressed the importance of two links between the Wind-Down Agreements and these third party claims for contribution and indemnity, related to professional negligence.
30. First, there is the fact that the Wind-Down Agreements expressly required each dealer to obtain independent legal advice before accepting General Motors’ offer. However, this requirement to obtain legal advice is entirely unrelated to the actual *quality* of the legal advice that was obtained, and it is the quality of this advice that forms the basis of each claim. It is also worth noting that such a requirement to obtain independent legal advice is commonly inserted into agreements where the terms are dictated by one party. This routine requirement should not have the effect of supporting the assumption of jurisdiction over claims in professional negligence by the courts of the province in which the agreement that is the subject of the legal advice happens to have been entered into.
31. In my view, it is clear that this requirement, imposed on the dealers, to obtain independent legal advice, and to confirm that such advice had been given, does not bring the Quebec lawyers within the scope of the dealers’ contractual relationship with General Motors, as is required by *Van Breda*: paras. 116-17. In that case, LeBel J. found that Ms. Van Breda was brought within the scope of Mr. Berg’s contractual relationship with Club Resorts because she was owed a benefit under Mr. Berg’s agreement: para. 116. In this case, the Quebec lawyers owe nothing and are owed nothing under the Wind-Down Agreements. Moreover, the requirement that the dealers provide General Motors with certificates confirming the receipt of independent legal advice was simply a matter of due diligence. It permitted General Motors to secure proof, for its own purposes, that its dealers had obtained advice on its standard-form offer. The signing of this certificate simply does not bring these lawyers within the scope of this contractual relationship.
32. I would add that the fragility of this alleged connection is all the more obvious when compared to established bases of jurisdiction — for instance, the place where the tort was allegedly committed, or the place where the defendant’s contractual obligations were to be performed.
33. Second, Cassels Brock argues that the Wind-Down Agreements are inextricably linked to the Quebec lawyers’ liability, since in each case the allegedly negligent legal advice was *about* the Wind-Down Agreement. In my view, there is nothing “real” or “substantial” about this connection either. Every day, lawyers advise local clients on contracts that will eventually be formed in — and be subject to the law of — another province or state. If these contracts are accepted as a fount of jurisdiction, then local lawyers advising their local clients on such contracts could be sued for professional negligence wherever the contracts happen to be entered into. In my view, this cannot be. There could be no clearer evidence of jurisdictional overreach.
34. Simply put, the only contracts that are capable of supporting the assumption of jurisdiction in this case are the retainer agreements between the Quebec lawyers and their clients, the Quebec dealers. These retainers were all concluded in Quebec, the same province where the lawyers’ services were to be provided, where the breaches or faults would have occurred, and where the damages would have been suffered. The Wind-Down Agreements, by contrast, are too remote. It is also no speculation to say that, had the Quebec dealers brought actions for damages against their own lawyers, it is unlikely that they would have instituted proceedings in Ontario.
35. In light of all of this, I am of the view that the broader approach to the fourth connecting factor proposed by Cassels Brock and adopted by my colleague Abella J. leads to jurisdictional overreach.
36. This conclusion is supported by the fact that every other jurisdiction I have surveyed and that I discuss below — including some “equally concerned about order and fairness as our own” (*Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 58) — would not have assumed subject matter jurisdiction over the underlying cause of action against the Quebec law firms in these circumstances.
37. The *Uniform Court Jurisdiction and Proceedings Transfer Act* (“*CJPTA*”) (online) provides that a province will only have a presumptively real and substantial connection over a claim in tort if the tort was committed in the province: s. 10(g). As this Court has stressed before, the *CJPTA* is an important Canadian benchmark: see *Van Breda*, at paras. 40-41; *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at para. 28; and *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at paras. 21-22. It was proposed by the Uniform Law Conference of Canada as an attempt to give meaning to the real and substantial connection test in a variety of circumstances, and forms the basis of provincial legislation in British Columbia, Saskatchewan, Nova Scotia and the Yukon: *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *The* *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C‑41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7 (not yet in force).
38. For its part, the *Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] O.J. L. 12/1 (the “*Brussels Regulation I*”), only provides subject matter jurisdiction over a claim “in matters relating to tort” in the courts “for the place where the harmful event occurred or may occur”: art. 5(3). The *Brussels Regulation* *I* is an important international benchmark, as it applies to all European Community Member States with the exception of Denmark, in cases where the defendant is domiciled in any one of those Member States: see J. Fawcett and J. Carruthers, *Cheshire, North & Fawcett Private International Law* (14th ed. 2008), at pp. 200 and 204-5.
39. Finally, under the *Civil Code of Québec* (“*C.C.Q.*”), Quebec authorities will only have subject matter jurisdiction over an action in extra-contractual liability where “a fault was committed in Québec” or where the “injury was suffered in Québec”: art. 3148 para. 1(3) *C.C.Q.*
40. I would add that neither the *CJPTA*, the *Brussels Regulation I*, nor the *C.C.Q.* even accept that a claim *in contract* can proceed in a jurisdiction merely because the contract was concluded there. Those instruments prefer to accord subject matter jurisdiction to the place where the defendant’s contractual obligation was to be performed: s. 10(e)(i) *CJPTA*; art. 5(1) *Brussels Regulation I*; art. 3148 para. 1(3) *C.C.Q.*
41. In response to these concerns of jurisdictional overreach, my colleague offers up only one line of defence. She suggests that, under art. 3139 of the *C.C.Q.*, a Quebec authority will always have jurisdiction over an incidental claim, including a third party claim, if it has jurisdiction over the principal demand. And so, my colleague implies, it would not be overreaching for the courts of Ontario to have jurisdiction over the third party claims against the Quebec law firms in this case, given that the courts of Ontario have jurisdiction over the principal action against Cassels Brock.
42. This argument simply fails to respond to my concern. This Court has not been asked to recognize, in the common law, an equivalent to art. 3139 of the *C.C.Q.* The issue before this Court is whether the subject matter of these third party claims is sufficiently connected with the province of Ontario. Nothing in art. 3139 of the *C.C.Q.* speaks to this issue.
43. It is worth recalling that art. 3139’s unique purpose is “to ensure the efficient use of juridical resources . . . by fostering the joinder of proceedings”: *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 30. As such, art. 3139, a “product of domestic procedural considerations” (*ibid.*), lends *no* support for my colleague’s conclusion that there is a sufficiently strong connection between the subject matter of these third party claims and the province of Ontario. Rather, art. 3139 reflects the sort of fairness and efficiency concerns that, after *Van Breda*, have no role to play in establishing jurisdiction. As LeBel J. remarked:

Jurisdiction must — irrespective of the question of forum of necessity, which I will not discuss here — be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a “real and substantial” connection for the purposes of the law of conflicts. [Emphasis added; para. 82.]

1. Finally, my colleague’s interpretation of art. 3139 risks pre-emptively settling, in *obiter*, a question of Quebec law that was not before this Court. It is not enough that a claim be incidental to a principal action for art. 3139 to be engaged. If there was simply *no* connection between the incidental action and the forum seized of the principal action, art. 3139 would be at risk of running afoul of the constitutional limitations placed on the jurisdiction of the courts of the Canadian provinces: see e.g. *Van Breda*, at paras. 21-22 and 31-32, citing G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 47. In this vein, LeBel J. in *GreCon* stressed that, while art. 3139 “does not mention this factor expressly, there must be some connexity between the principal action and the incidental action”: para. 31. He added that art. 3139 has to be assessed in light of private international law imperatives, such as “the need to avoid enlarging the jurisdiction of states unduly”: para. 30. Precisely what this means strikes me as an important and unresolved issue, one that this Court should not settle without fulsome debate.
2. In the end, as I have said, the proposed broader approach to the fourth connecting factor risks supporting the assumption of jurisdiction by the courts of Ontario and other common law provinces where there is simply no convincing connection between the province and the subject matter of the dispute. A narrower approach is in my view required.
   * 1. Certainty and Predictability
3. As I see it, this broader approach also jeopardizes the certainty and predictability that was promised when *Van Breda*’s presumptive bases of jurisdiction replaced the discretionary list of factors outlined in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.).
4. On my restrained approach, it should always be clear when this fourth connecting factor can serve as a basis for jurisdiction. By contrast, my colleague’s approach amounts to an open invitation for litigants to engage in long-winded jurisdictional debates, since the words “connected with” and “connection” are notoriously flexible and fact-specific. It is worth remembering that it was the vagueness of the word “connection” that led some authors to criticize the “real and substantial connection” test for being “too loose and unpredictable to facilitate an orderly resolution of conflicts issues”: *Van Breda*, at para. 30, citing J.-G. Castel, “The Uncertainty Factor in Canadian Private International Law” (2007), 52 *McGill L.J.* 555, and J. Blom and E. Edinger, “The Chimera of the Real and Substantial Connection Test” (2005), 38 *U.B.C. L. Rev.* 373. Echoing that criticism after *Van Breda*,some authors expressed the view that the fourth connecting factor “would seem in need of explanation”: Black, at p. 426.
5. Small variations of the facts of the case at bar illustrate this point. If independent legal advice was required for multiple contracts concluded in different jurisdictions, the parties would have had to spar over whether any one of those contracts could ground a claim in professional negligence. Future litigants may also wonder whether the requirement of obtaining independent legal advice was actually necessary to establish a connection between the contract and the dispute, or whether simply providing negligent advice on such a contract is sufficient.
6. Future cases with entirely different facts will surely yield other fine-grained debates about the sufficiency of the contract’s connection. These will compromise parties’ ability “to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect”, as LeBel J. stressed they must be able to do: *Van Breda*, at para. 73.
7. My colleague suggests that the fourth connecting factor achieves sufficient certainty by premising the determination of where a contract will be “made” on the traditional rules of contract formation: para. 31. In my colleague’s view, once parties are able to determine where a contract will be formed, they will also be able to determine with “reasonable confidence” when jurisdiction can or cannot be assumed under the fourth factor.
8. I respectfully disagree. If the parties are not able to predict with certainty *which* contracts will be “connected with” a potential tort claim, their ability to predict where any particular contract will be formed will be of little assistance. More troublingly still, under my colleague’s approach, the defendant in tort may not even be a party to the contract, and there is no reason why we should expect that individuals who are not parties to a contract will know, or will be able to predict, where any given contract will be formed.
9. The need for certainty and predictability in shaping conflicts rules can hardly be overstated. As La Forest J. stressed in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, “[o]ne of the main goals of any conflicts rule is to create certainty in the law”: p. 1061. This yearning for “fixed, clear and predictable” conflicts rules has long guided this Court, and has been urged by a number of authors: T. J. Monestier, “A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2007), 33 *Queen’s L.J.* 179, at p. 192; Castel; Blom and Edinger.
10. Among other benefits, “[c]lear application of law promotes settlement” (*Tolofson*, at p. 1062) and discourages what my colleague Gascon J. has called the “needless and wasteful jurisdictional inquiries that merely thwart the proceedings from their eventual resumption”: *Chevron Corp.*, at para. 69. Like Gascon J., I am of the view that courts “should exercise care in interpreting rules and developing legal principles so as not to encourage unnecessary” jurisdictional motions: G. D. Watson and F. Au, “Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard” (2000), 23 *Adv. Q.* 167, at p. 205, cited in *Chevron Corp.*, at para. 69.
11. Of course, LeBel J. did observe that “striking a proper balance between flexibility and predictability, or between fairness and order, has been a constant theme in the Canadian jurisprudence”: *Van Breda*, at para. 66. However, LeBel J. went on to note that “in recent years” the preferred approach to the law of jurisdiction in Canada “has been to rely on a set of specific factors, which are given presumptive effect”: para. 75 (emphasis added).
12. Writing for the entire Court, LeBel J. explained this modern preference by outlining what I view to be a fundamental proposition in jurisdictional matters — that while “[j]ustice and fairness are undoubtedly essential purposes of a sound system of private international law”, those objectives “cannotbe attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court”: *Van Breda*, at para. 73 (emphasis added). As such, “[p]arties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect”: para. 73 (emphasis added).
13. In LeBel J.’s view, the four connecting factors were meant to be “specific”, not flexible and diffuse. It must be remembered that *Van Breda* sought to put an end to a “framework for the assumption of jurisdiction” that was “unstable, *ad hoc*” and “made up ‘on the fly’ on a case-by-case basis”: para. 73. Nowhere in his reasons does LeBel J. stress the need to avoid a disciplined and rigorous approach to the four connecting factors. After all, courts may always identify *new* presumptive connecting factors in order to adapt the law “as the needs of the system evolve”: para. 82.
    * 1. Potential Implications on the Practice of Law
14. In addition, one must not ignore that there may be harmful commercial implications that flow from a broader approach to the fourth connecting factor.
15. As I have said, jurisdiction matters. In the context of this case, an expansive approach to jurisdiction means that whenever a lawyer’s advice is required before his client can accept an offer, that lawyer may later be sued for professional negligence wherever the contract on which he provided legal advice is ultimately formed, regardless of where his contract for legal services was entered into, and where his services were provided. It is worth remembering that once jurisdiction is deemed to exist, it can only be declined in the clearest of cases: *Van Breda*, at para. 109.
16. With respect, my colleague’s position risks causing, in the end, certain negative repercussions on the practice of law itself. Where a lawyer’s advice is required before a contract can be concluded, the lawyers who are retained to provide advice may feel conflicted, since they will likely have a personal stake in where their client’s contract is entered into. Our modern-day, cosmopolitan legal practice may even be impeded, a risk that is aggravated by the fact that a lawyer’s professional liability insurance is often subjected to lower coverage for claims instituted outside the lawyer’s own jurisdiction. As an illustration of this, during oral argument, counsel for the Quebec law firms reminded the Court that the Barreau du Québec’s liability insurance policy indemnifies lawyers sued for professional negligence for up to $10 million if sued in Quebec, but only up to $1 million if sued outside the province.
    1. Forum Non Conveniens
17. Finally, there remains the issue regarding the claims against the two national law firms which have offices both in Quebec and in Ontario. In my view, Ontario has jurisdiction over these claims on the basis of the second connecting factor, namely, that the “defendant carries on business in the province”: *Van Breda*, at para. 90.
18. It thus falls on those national law firms contesting jurisdiction to establish that another jurisdiction is clearly more appropriate: *Van Breda*,at paras. 102-3. In the past, this Court has turned to the following factors to determine if this is the case:
    * + 1. the place of residence of the parties and witnesses;
        2. the location of the evidence;
        3. the place of formation and execution of the contract;
        4. the existence of proceedings pending between parties in another jurisdiction and the stage of any such proceeding;
        5. the location of the defendant’s assets;
        6. the applicable law;
        7. the advantage conferred on the plaintiff by its choice of forum;
        8. the interests of justice;
        9. the interests of the two parties;
        10. the need to have the judgment recognized in another jurisdiction.

(*Breeden*, at para. 25, citing *Oppenheim forfait GMBH v. Lexus maritime inc.*,1998 CanLII 13001 (Que. C.A.), at pp. 7-8.)

1. In evaluating these factors, my colleague’s conclusion is strongly influenced by her view that all of the third party claims can be disposed of within one trial, thereby avoiding “the possibility of conflicting judgments and duplication in fact-finding and legal analysis”: para. 59. Respectfully, that is not the nature of the third party proceedings before us.
2. The trial in the class action against Cassels Brock was held from September 9 to December 19, 2014. McEwen J. rendered judgment on July 8, 2015, concluding that Cassels Brock was responsible for $45 million in damages to the class members for failing to fulfill its contractual and fiduciary obligations, and for failing to meet the standard of care of a reasonably prudent solicitor or law firm: *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2015 ONSC 3824, 30 C.B.R. (6th) 1. In its written submissions, Cassels Brock indicated that this judgment is currently under appeal.
3. On December 23, 2011, Cassels Brock instituted proceedings seeking indemnity and contribution from 150 other lawyers and law firms. These third party claims are not a class action, but represent instead a combination of separate actions which are *not* identical. These claims are simply not in the nature of proceedings where common issues can be resolved for an entire group. As the motions judge found, “[e]ach case would be fact-specific and would depend on the particular advice that was given by each local lawyer to his or her particular dealer/client”: para. 24 (emphasis added).
4. To this, I would add that the lawyers’ level of care and diligence may vary from case to case, as may each dealer’s relationship with his or her counsel. Some lawyers may have given their advice far too quickly, while others may have undertaken thorough research and analysis before providing theirs. Some lawyers may have had more experience than others in these matters. The financial situation of each dealer may also have come into play. A dealer may have been advised not to enter into the Wind-Down Agreement, but may have decided to do so, regardless. In the end, there may be as many defences as there are defendants. As such, some claims may be dismissed while others may be granted. The quantum of damages may also vary from case to case. Simply put, there is a great deal of potential divergence between each of these 150 third party claims.
5. Moreover, as I have already decided above, the courts of Ontario should not have jurisdiction over the third party claims against the law firms based solely in Quebec. As such, there is no possibility that any of these claims would be resolved in Ontario. If, in my view, these claims would be heard separately, and if most of the claims against Quebec lawyers would proceed in Quebec anyway, it is clear that Quebec is the more appropriate forum for the remaining claims against the two national law firms.
6. Most of these lawyers from the national law firms are domiciled in Quebec, where they practise their profession as members of the Barreau du Québec. The other witnesses — notably the dealers’ representatives — are also residents of Quebec. If these claims against the national firms were heard in Ontario, these witnesses would all have to travel there to testify, incurring significant additional costs. Furthermore, Quebec law will govern the claims against the national law firms with offices in Quebec on the basis that the fault would have occurred in Quebec. As such, additional costs would have to be incurred to provide an Ontario court with expert opinions on Quebec law. Finally, if the claims against the Quebec law firms were to be divided between Quebec and Ontario, there is a risk that the courts of Ontario and Quebec may render conflicting decisions *while applying Quebec civil law*.
7. For these reasons, it is clear that Quebec is the more appropriate forum for these remaining claims, and that whatever jurisdiction the courts of Ontario possess over these national firms should be declined.
8. As a final matter, I recognize that my analysis regarding *forum non conveniens* would result in overturning the motions judge’s discretionary decision, one which is owed significant deference on appeal: *Van Breda*,at para. 112. However, the motions judge’s analysis of the *forum non conveniens* issue began on the premise that all of the third party claims, including those against the Quebec law firms, could be heard in Ontario. As I have concluded, the courts of Ontario should not have jurisdiction over the third party claims against the law firms based exclusively in Quebec. This provides sufficient grounds for intervention: *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at para. 41.
9. Disposition
10. I would allow the appeal with costs.

*Appeal dismissed with costs,* Côté J. *dissenting.*

Solicitors for the appellants: Clyde & Cie Canada, Montréal.

Solicitors for the respondent: Lenczner Slaght Royce Smith Griffin, Toronto.

1. *Club Resorts Ltd. v. Van Breda*,[2012] 1 S.C.R. 572. [↑](#footnote-ref-1)
2. 5. Release; Covenant Not to Sue; Indemnity.

   (a) Each Dealer and Dealer Operator on their own behalf and on behalf of any of their respective Affiliates, members, partners, venturers, shareholders, Dealer Owners, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, and assigns (collectively, the “Dealer Parties”), hereby absolutely and irrevocably . . . releases, settles, cancels, discharges, and acknowledges to be fully satisfied any and all claims, demands, complaints, damages, debts, liabilities, obligations, costs, expenses, liens, actions, and causes of action of every kind and nature whatsoever (including without limiting the generality of the foregoing, negligence), whether known or unknown, foreseen or unforeseen, suspected or unsuspected, in law or in equity (“Claims”), which any of the Dealer Parties may have as of the Effective Date or may thereafter have or acquire at any time against GM, its Affiliates, or any of its or their members, partners, venturers, shareholders, officers, directors, employees, agents, spouses, legal representatives, heirs, administrators, executors, successors, or assigns (collectively, the “GM Entities”), arising out of or relating to:

   . . .

   (v) . . . *any and all applicable statute, regulation, or other law, including Ontario’s Arthur Wishart Act (Franchise Disclosure), 2000, Alberta’s Franchises Act, Prince Edward Island’s Franchises Act and/or any other similar franchise legislation which may be enacted or proclaimed in force in the future (collectively, the “Acts”)*. Dealer and Dealer Operator acknowledge that it has always been and continues to be GM’s position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator. However, if a court were to conclude otherwise, Dealer and Dealer Operator specifically acknowledge that it and they are hereby waiving any and all rights given to it or them under the Acts and are hereby releasing GM and the other GM Entities from any obligation or requirement imposed on GM and/or any of the other GM Entities by the Acts and further acknowledge that they are doing so with full awareness of such rights, obligations and requirements, and intend to waive its and their rights to: (1) any Claim for a breach of the duty of fair dealing in the performance or enforcement of or exercise of any right under the Dealer Agreement; (2) any Claim for GM and/or any of the other GM Entities penalizing, attempting to penalize or threatening to penalize the Dealer and/or the Dealer Operator for associating with other GM dealers or retailers; (3) any Claim for damages for a misrepresentation contained in a disclosure document or a statement of material change; (4) any Claim for rescission for failure to provide a disclosure document or a statement of material change as required by the Acts; (5) any Claim for rescission for failure to provide a disclosure document or a statement of material change within the time required by the Acts; (6) any Claim for rescission for providing a deficient disclosure document or statement of material change as required by the Acts; and (7) any other Claims arising under one or more or all of the Acts; . . . . [Italics added.] [↑](#footnote-ref-2)
3. *Trillium Motor World Ltd. v. General Motors of Canada Ltd.* (2013), 51 C.P.C. (7th) 419 (Ont. S.C.J.). [↑](#footnote-ref-3)
4. *Trillium Motor World Ltd. v. General Motors of Canada Ltd.* (2014), 120 O.R. (3d) 598 (C.A.). [↑](#footnote-ref-4)
5. Leave to appeal in *Eco-Tec Inc.* dismissed (May 5, 2016), file no. 36825 (S.C.C.). [↑](#footnote-ref-5)