CITATION: Shirodkar v. Coinbase Global, Inc. et al., 2024 ONSC 1399
COURT FILE NO.: CV-22-00690257-00CP
DATE: 20240321

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Shantanu Shirodkar

AND:

Coinbase Global, Inc., Coinbase, Inc., Coinbase Europe Limited and Coinbase Canada Inc.

BEFORE: J.T. Akbarali J.

COUNSEL: *Peter R. Jervis, Douglas M. Worndl, and Ronald Podolny*, for the plaintiff

Robert W. Staley, Cheryl M. Woodin, Douglas A. Fenton and Marshall Torgov, for the defendants

HEARD: January 5, 2024

Proceeding under the *Class Proceedings Act*, 1992

ENDORSEMENT

Overview

[1] The defendants in this putative class action bring this motion seeking: (i) an order dismissing this action for want of jurisdiction; and (ii) an order permanently staying this action on the basis of *forum non conveniens*. The defendants also bring a motion to exclude certain evidence relied upon by the plaintiff.

Brief Background

[2] The plaintiff brings this action against four related defendants, arising out of his use of an online platform which I will refer to as the Coinbase platform. The defendant Coinbase Global, Inc. ("Coinbase Global") is the parent company of the Coinbase group of companies and acts as a holding company. Below, in the context of this brief background, I explain the roles that other Coinbase companies, including the other Coinbase defendants, played with respect to the plaintiff's account and the Coinbase platform.

[3] The Coinbase platform permits users to purchase and sell digital assets, including cryptocurrency assets and cryptocurrency contracts, from and to other users of the platform.

[4] The defendants' affiant explains that digital assets are a digital representation of value that functions as a medium of exchange, a unit of account or a store of value, but does not have the status of legal tender. One form of digital asset is cryptocurrency, a form of decentralized digital money (for example, bitcoin or Ethereum), that operates on the blockchain ledger. The blockchain ledger lists and publicly tracks the ownership of every digital asset in existence and provides a full transaction history for each digital asset. Cryptocurrency makes it possible for a user to transfer value virtually instantaneously to another user online without an intermediary, such as a bank.

[5] In contrast, the word "token" can be used to describe digital assets that operate on top of another cryptocurrency's blockchain. The website www.coinbase.com explains that tokens can be held or traded like any other cryptocurrency.

[6] In October 2017, the plaintiff created an account for the Coinbase platform. At that time, he lived in France, although at some point (exactly when is unclear to me), he relocated to Ontario. To open his account, he accepted a user agreement (the "2017 User Agreement") with a company domiciled in England, Coinbase UK Ltd. ("Coinbase UK"). The terms of the 2017 User Agreement provide that the agreement was a contract between the user (the plaintiff) and Coinbase UK which would be governed by English law and the non-exclusive jurisdiction of the English courts.

[7] Coinbase UK was not named as a defendant herein, and it has been dissolved.

[8] On November 20, 2020, the plaintiff accepted a User Agreement to continue to use the Coinbase platform (the "First 2020 User Agreement"). The counterparties to the 2020 User Agreement were the defendant, Coinbase Europe Ltd. ("Coinbase Europe") and Coinbase Ireland Limited. Coinbase Ireland is not a defendant in these proceedings[1].

[9] The First 2020 User Agreement provided that Coinbase Europe may provide services to the plaintiff consisting of (i) hosting digital currency wallets, and (ii) a digital currency exchange service, enabling the plaintiff to purchase and sell digital currencies. The First 2020 User Agreement provided that the contract was governed by the laws of Ireland and the non-exclusive jurisdiction of the Irish courts.

[10] Two days later, on November 22, 2020, the plaintiff accepted a user agreement (the "Second 2020 User Agreement"), the counterparties to which were Coinbase Europe and CB

[1] Under the 2020 User Agreement, Coinbase Ireland provided e-money services which retail users in Canada did not have the ability to access at the relevant time. As a result, Coinbase Ireland could not have provided services to the plaintiff. There is no reason to say anything more about Coinbase Ireland.

Payments, Ltd.[2] The Second 2020 User Agreement provided that the parties' relationship would be governed by the law of England and Wales.

[11] The plaintiff conducted purchase and sale transactions on the Coinbase platform between October 2017 and January 2021, during which time he resided in France and then, later, in Ontario. To transact on the Coinbase platform, the plaintiff would log in via his computer to the Coinbase platform (www.coinbase.com) to place a buy or sell order. The Coinbase platform is operated by the defendant Coinbase Inc. Users wishing to buy or sell a digital asset on the Coinbase platform are matched through an engine operated by Coinbase Inc. Coinbase Inc.'s internal software then fulfils the trade and settles the transaction by executing corresponding debits and credits in the purchasing and selling users' respective accounts.

[12] Digital assets are relatively new, and securities regulators have turned their attention to whether and how to regulate the digital asset market. Coinbase Europe began engaging with Canadian securities regulators including the Quebec Authorité de Marchés Financiers (the "AMF"), the Ontario Securities Commission (the "OSC") and other Canadian regulators. Initially, the plan was that Coinbase Europe would seek registration as a "restricted dealer" and seek exemptive relief from some of the requirements under securities legislation, including relief from the prospectus requirements. To that end, on November 11, 2021, Coinbase Europe made an application to the AMF for registration as a "restricted dealer", and in March 2022, it applied for exemptive relief from, among other things, the prospectus requirements. It states that it did so because staff at the regulator were of the view that exemption from the requirements was necessary, but the defendants deny that the digital assets are securities.[3]

[13] Ultimately, the Coinbase group of companies decided that Coinbase Europe ought not to be the entity to register in Canada. Rather, they turned to a Canadian Coinbase company, the defendant Coinbase Canada Inc. ("Coinbase Canada") which, up until that point, had been operating as an employment vehicle for Canadian-resident Coinbase employees who were supporting Coinbase operations globally in Coinbase's remote-first workplace.

[14] To re-order its operations to facilitate this change, on February 22, 2023, Canadian users of the Coinbase platform were transitioned to contracts with Coinbase Canada, and were required to execute new user agreements (the "Canadian User Agreement"), about which I will say more in my analysis of the jurisdictional issues.

[15] A few months before the transition to Coinbase Canada from Coinbase Europe for Canadian users, on November 22, 2022, the plaintiff issued the statement of claim in this putative

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[2] Like Coinbase Ireland, CB Payments offered e-money services which retail users in Canada could not access. CB Payments is not a defendant in this action. There is no reason to say anything more about CB Payments.

[3] The question of whether the digital assets are securities is a question related to the merits of this action, and not one that needs to be, or indeed can be, determined on this motion.

class action. In it, he alleges that the crypto assets being sold on the Coinbase platform are securities as defined by s. 1(1) of the *Securities Act*, R.S.O. 1990, c. S. 5. He seeks a declaration that the defendants violated securities legislation in Ontario and throughout Canada by issuing and distributing securities to class members without complying with the disclosure requirements in the legislation, including the prospectus requirements. He argues that the digital assets were extremely volatile, and subject to the risk of a significant and sudden decline in value, and that by failing to comply with their disclosure requirements, the defendants failed to disclose to investors the nature of the assets being distributed, including the risks inherent in them.

[16] The plaintiff seeks statutory damages pursuant to s. 133 of the *Securities Act*, which provides a right of action for recission or damages against "the dealer or offeror" who failed to comply with certain requirements, including to "the purchaser of a security to whom a prospectus was required to be sent or delivered but was not sent or delivered in compliance with subsection 71(1)". The claim is a statutory claim only; no common law claims are pleaded.

[17] The defendants delivered their notice of (this) motion dated April 25, 2023, in which they seek a declaration that this court has no jurisdiction to hear this action, and alternatively, an order staying this action on the basis of *forum non conveniens*.

[18] After the notice of motion was delivered, on May 7, 2023, the plaintiff logged into his Coinbase account for the first time in about eight months and accepted the Canadian User Agreement. Since that time, he has moved some digital assets into his Coinbase wallet for storage, but he has neither purchased nor sold any digital assets on the Coinbase platform since Coinbase Canada became the counterparty to his user agreement.

[19] This brief recitation of the background to this action does not begin to capture the evidence that was led. To the extent additional evidence is necessary to my analysis, I address it below.

Issues

[20] This motion raises the following issues:

a. Does the court have jurisdiction to hear the plaintiff's action on the basis of:

   i. Presence-based jurisdiction;

   ii. Consent-based jurisdiction; or

   iii. Assumed jurisdiction?

b. If it does, should the action be permanently stayed on the basis of *forum non conveniens*?

[21] In addition, the defendants have brought a separate motion to strike the evidence of: (i) the plaintiff's proposed experts, Dr. Andreas Park, and Dr. S.P. Kothari, arguing that their evidence is not relevant, and that the experts are not properly qualified because they are partial; and (ii) the

affidavit of Juela Xhaferraj, one of the plaintiff's counsel, because they argue that the affidavit inappropriately shields the plaintiff from cross-examination. I address the jurisdictional motion first.

Jurisdictional Analysis

[22] As I have noted, the plaintiff asserts jurisdiction on three bases: presence-based jurisdiction, consent-based jurisdiction, and assumed jurisdiction. I consider each in turn.

Presence-based Jurisdiction

Legal Principles

[23] Presence-based jurisdiction is one of two "traditional" jurisdictional grounds: *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 82; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), at para. 19.

[24] In *Chevron*, at para. 85, the Supreme Court of Canada held that, to establish presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time the action was commenced. This is a factual enquiry that involves inquiring into whether the company has some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time. Maintaining physical business premises is a compelling jurisdictional factor.

[25] In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, a case about assumed jurisdiction, Lebel J. held that carrying on business in the jurisdiction may be an appropriate connecting factor in the assumed jurisdiction analysis, but he did so with reservations. He cautioned against creating "what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity": at para. 87. He found that active advertising in the jurisdiction, or the fact that a web site can be accessed from the jurisdiction, would not suffice to establish that a defendant is carrying on business in the jurisdiction. Rather, "carrying on business requires some form of actual, not only virtual presence in the jurisdiction, such as maintaining an office there": at para. 87.

[26] These principles were reiterated by the Supreme Court of Canada in *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44, where the Court also noted that, although *Van Breda* was a case about assumed jurisdiction, the portion of *Van Breda* cited in *Chevron* about what it means to be carrying on business in a jurisdiction also applies to traditional presence-based jurisdiction. The Court held that "if the 'carrying on business' standard from *Van Breda* for assumed jurisdiction is different from the 'carrying on business' standard from *Chevron* for presence-based jurisdiction, the *Van Breda* standard is *less onerous*": at para. 45. The requirements for carrying on business set out in *Van Breda* thus apply to cases where presence-based jurisdiction is asserted.

[27] In *Yip v. HSBC Holdings plc*, 2017 ONSC 5332 ["*Yip SCJ*"], aff'd 2018 ONCA 626 ["*Yip CA*"], a case based on alleged breaches of the *Securities Act*, the Court of Appeal for Ontario held, at para. 41, that a foreign defendant could not be found to be carrying on business in Ontario simply

because the plaintiff could access the foreign defendant's disclosure information using his computer in Ontario, noting that the opposite finding would give rise to the universal jurisdiction that LeBel J. explicitly rejected in *Van Breda*.

[28] The plaintiff argues that the "carrying on business" analysis has been adapted to the realities of online business, and a physical office or presence in the jurisdiction is not required. The plaintiff relies on *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, aff'g 2015 BCCA 265. As noted by this court in *Vahle et al. v. Global Work & Travel Co. Inc.*, 2019 ONSC 3624, 146 O.R. (3d) 511, aff'd 2020 ONCA 224, while *Google* was a case where the British Columbia courts exercised jurisdiction over Google even though it had no servers, offices or employees in the province, Google did gather information and data in British Columbia which led to targeted search results and targeted advertising towards residents of British Columbia. It was those activities that led the British Columbia courts to conclude that Google was carrying on business in the province: at para. 38.

[29] Similarly, in *Rieder v. Plista GMBH*, 2021 ONSC 4458, at paras. 21 and 26, aff'd 2022 ONCA 281, a jurisdictional case involving e-commerce, the courts considered whether there was any evidence that the foreign defendant targeted any Ontario resident through the use of its website.

[30] The following factors may also be relevant to a finding that a defendant is carrying on business in the jurisdiction:

a. Registration as an extra-provincial corporation: in *Turner v. Bell Mobility Inc.*, 2014 ABQB 36, at para. 47-48, the court considered that the fact that a telecommunications corporation had registered as an extra-provincial corporation to be relevant, particularly when "located in the midst of other existing facts" which included the corporation's contracts with over 4,000 Albertans with Albertan billing addresses, and the corporation's involvement in a commercial arrangement with a "nation-wide network" of co-operating corporations providing pan-Canadian coverage. The court found that the corporation was carrying on business in Alberta.

b. Obtaining a licence or registration from a regulator in order to undertake a particular business activity within the jurisdiction: in *Vale Canada Limited v. Royal and Sun Alliance*, 2022 ONCA 862 ["*Vale CA"*], rev'g 2022 ONSC 12 ["*Vale SCJ*"], the Court of Appeal was dealing with a case involving an insurer, where the *Insurance Act* deemed a broad range of activities to constitute carrying on the business of insurance in Ontario. The court noted that legislative schemes do not determine, for the purpose of a jurisdictional analysis, where the business activity took place. However, it found that where an insurer was registered in Canada and licenced in Ontario, "that could be taken as an indicator it was engaged in the type of activities in Ontario that required it to be so registered and licensed, and thus is relevant to the existence of a jurisdictional connector to Ontario": at para. 109. See also *Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC*, 2016 ONCA 977, 135 O.R. (3d) 551, at para. 10.

c. Whether executives and key decision makers within the corporation reside and work in the jurisdiction: *EM Technologies, Inc. et al.*, 2013 ONSC 5849, at para. 15.

d. Whether the defendant has employees in the jurisdiction: *EM Technologies*, at para. 15.

[31] Considering these principles and the evidence in the record, are the Coinbase defendants, or any of them, carrying on business in Ontario?

Coinbase Europe

[32] In support of the claim that presence-based jurisdiction applies, the plaintiff notes that Coinbase Europe appointed Goda Incorporators Inc. ("Goda"), located in Toronto and associated with Coinbase's Canadian law firm, as its agent for service in Ontario.

[33] However, the plaintiff cites no law to support the proposition that appointing an agent for service amounts to carrying on business in the jurisdiction. I have difficulty with this argument. One appoints an agent for service in a jurisdiction because one does not have a physical presence in the jurisdiction.

[34] In this case, Coinbase Europe appointed Goda as its agent for service in connection with its application for registration as a restricted dealer, which was never concluded. Coinbase Europe thus was never registered to carry on business in Canada.

[35] Coinbase Europe registered with the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") as a money service business. The plaintiff notes that pursuant to the governing legislation, *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, s. 5, only entities that have a place of business in Canada, or that do not, but provide services that are directed at persons or entities in Canada and that provide those services to their clients in Canada, are required to register with FINTRAC. But in *Vale CA*, the court held that legislative schemes do not determine where a business activity takes place for purposes of a jurisdictional analysis; rather, registration could be taken as an indicator that an entity was engaged in the type of activities in Ontario that required it to be registered.

[36] I accept that FINTRAC registration could be taken as indicator that Coinbase Europe was engaged in activities in Ontario that required it to be registered with FINTRAC; that is a truism. But registration with FINTRAC is not determinative of the court's jurisdiction. Given the guidance of LeBel J. in *Van Breda*, merely providing services in Canada does not constitute carrying on business in the jurisdiction in a manner that leads to presence-based jurisdiction (or assumed jurisdiction for that matter). FINTRAC registration is one factor that goes into the mix.

[37] Coinbase Europe's services were available to be virtually accessed by people located in Ontario, but it did not perform "some substantial aspect of its own business undertaking" apart from making available its services in Ontario: *Yip SCJ*, at para. 186. Unlike in *Google*, there is no evidence of targeted advertising undertaken by Coinbase Europe in Ontario, or of data collection.

Rather, Coinbase Europe's services were global in reach, in that the user agreement with Coinbase Europe applied to all Coinbase users outside of the United States of America, excluding users who resided in the European Economic Area or Singapore. Moreover, consistent with the terms of the user agreement, Coinbase Europe provides its services from Ireland.

[38] Coinbase Europe's activities in Ontario recall the description set out by LeBel J. in *Van Breda*, at para. 87: the fact that Coinbase Europe's website could be accessed from Ontario is not sufficient to establish that it was carrying on business in Ontario. Coinbase Europe's presence in the jurisdiction was virtual only, and passive. It does not meet the requirements set out in *Van Breda* to be carrying on business in Ontario, and I find that it did not carry on business in Ontario.

Coinbase Global

[39] Coinbase Global is a publicly traded holding company domiciled in Delaware. It has no physical presence in Ontario and no role in the operation of the Coinbase Platform. There is no evidence that Coinbase Global has engaged in any targeted advertising in Ontario, or any data collection in Ontario.

[40] The plaintiff alleges Coinbase Global has acknowledged that it carries on business in Ontario because it has capitalized its indirect subsidiary, Coinbase Canada. This argument collapses the legal identity of the Coinbase defendants into one, and is not consistent with basic principles of separation of legal identity. As this court found in *Yip SCJ* at para. 198, a foreign parent does not carry on business in Ontario through a domestic subsidiary due only to its share ownership.

[41] The plaintiff also alleges that Coinbase Global admitted that it carries on business in Canada in a form filed in connection with Coinbase Canada's application for registration as a restricted securities dealer in every province and territory of Canada. In that application, Coinbase Global described that it offers "virtual asset exchange, trading, hosted wallet, and ancillary services" to approximately 103 million verified users globally "through its operating subsidiaries". This is not an admission that Coinbase Global is carrying on business in Canada. Rather, Coinbase Global's subsidiary, Coinbase Canada (as of the date of the application) "provides crypto-asset and fiat services to Coinbase's retail customer base in Canada, in addition to continuing to function as the local employing entity".

[42] Coinbase Global also registered with FINTRAC, but as I have noted, this factor alone is not sufficient to establish that it carries on business in Ontario.

[43] I find that Coinbase Global has never carried on business in Ontario.

Coinbase Inc.

[44] Coinbase Inc. has been registered as an extra-provincial corporation in Ontario since December 1, 2021, almost 10 months after the plaintiff's last transaction on the Coinbase Platform (made through Coinbase Europe). Coinbase Inc. has appointed Goda as its agent for service.

Coinbase Inc. took both these steps in connection with anticipated regulatory filings which ultimately did not occur.

[45] The *Extra-Provincial Corporations Act*, R.S.O. 1990, c. E. 27, s. 1(3) provides that an extra-provincial corporation does not carry on business in Ontario by reason only that it (a) takes orders for or buys or sells goods, wares and merchandise, or (b) offers or sells services of any type, by use of travelers or through advertising or correspondence. Registration as an extra-provincial corporation could be an indicator that a corporation is carrying on business in Ontario, but it is not determinative. Here, where the registration took place to facilitate regulatory filings that never occurred, I do not place significant weight on this factor.

[46] Coinbase Inc. also registered with FINTRAC, but for the reasons I have already explained, registration with FINTRAC is not determinative.

[47] I place great weight on the evidence indicating that Coinbase Inc. operates the Coinbase Platform outside of Ontario, and never contracted with retail users of the Coinbase Platform in Ontario. It has no physical presence in Ontario. There is no evidence that it has engaged in targeted advertising in Ontario or in data collection in Ontario.

[48] I find that Coinbase Inc. does not carry on business in Ontario.

Coinbase Canada

[49] Coinbase Canada is incorporated under the laws of British Columbia. It did not carry on business in Ontario in a manner connected to the subject matter of the plaintiff's claims at the time the claim was commenced. While the plaintiff was engaged in buying and selling on the Coinbase Platform, Coinbase Canada's business was to employ Canadian residents who worked remotely on international projects for Coinbase.

[50] However, it is apparent from the record that Coinbase Canada itself believed it was carrying on business in Ontario as of December 2020. It filed its Initial Return with the Ontario Ministry of Government Services indicating that it commenced business activity in Ontario on December 11, 2020.

[51] Coinbase Canada employs approximately 150-200 people in Canada, most of whom are engineers, and who reside across Canada, including in Ontario. These employees work remotely on Coinbase's global projects from Ontario.

[52] Coinbase Canada also had key members of its team carrying on their duties in Ontario, including Lucas Matheson, who had been a Coinbase consultant before becoming its Chief Executive Officer in December 2022. Mr. Matheson did not become Coinbase Canada's CEO until after the plaintiff's claim was issued. I do not know whether he was its CEO when the claim was served on Coinbase Canada, as I cannot locate the affidavits of service in the record. In any event, he became the CEO within the window for service of the claim, and occupied a consultancy role for Coinbase Canada from Ontario at the time the statement of claim was issued. As I have noted, Mr. Matheson's and the Ontario-based Coinbase employees' duties were unrelated to the

plaintiff's claims at the time they arose, but presence-based jurisdiction does not require a real and substantial connection to the subject matter of the action: *Chevron*, at para. 83.

[53] I thus conclude that Coinbase Canada was carrying on business in Ontario when the claim was commenced. The plaintiff has established presence-based jurisdiction over Coinbase Canada.

[54] I note that Coinbase Canada also maintained registrations that, in the context of the evidence of Coinbase Canada's activities in Ontario, support a conclusion that it was carrying on business in Ontario, including registration with the Ministry of Government and Consumer Services as an extra-provincial corporation, and its registration with FINTRAC. However, I place the most weight on Coinbase Canada's admission, on its Initial Return, that it commenced business activity in Ontario in 2020 in concluding that this court has presence-based jurisdiction over Coinbase Canada.

Consent-based Jurisdiction

[55] Consent-based jurisdiction may be asserted against an out-of-province defendant where the defendant has consented, "whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court": *Muscutt*, at para. 19.

[56] The plaintiff alleges that this court has consent-based jurisdiction over Coinbase Global, Coinbase Europe and Coinbase Inc. based on:

a. The user agreement entered into between Coinbase Canada and the plaintiff; and

b. The dealings between securities regulators and the Coinbase defendants.

[57] I consider each of these in turn.

<u>The Canadian User Agreement</u>

[58] The key provision of the Canadian User Agreement is found in para. 10.4. It reads, in relevant part:

> …Any complaints, claims, disagreements or disputes arising out of or in connection with this Agreement or relating in any way to your access to or use of the Coinbase Services, the Coinbase Platform or the Site, any Communications you receive, any products sold or distributed through the Coinbase Services[4], the Coinbase Platform,

[4] Coinbase Services are defined as Fiat Services, Digital Asset Services and Additional Services (each of which is also a defined term) as well as other services that may be offered by Coinbase from time to time. Fiat Services is a explained to be a hosted digital wallet enabling the user to deposit and store fiat funds for use on the Coinbase Platform. Digital Asset Services are described as one or more hosted Digital Asset

> the Site or this Agreement and prior versions of this Agreement, including claims and disputes that arose between us before the effective date of these terms, that cannot be resolved via the complaint process set out in section 10.2 above, may be adjudicated by a court of competent jurisdiction located in Ontario, Canada. You agree to submit to the non-exclusive jurisdiction of the court of Ontario, Canada.

[59] The agreement specifies that "references to "Coinbase", "we", "our" or "us", are to Coinbase Canada, and references to "you" or "your" are to the person with whom Coinbase enters into this agreement." In the agreement, Coinbase Group refers to "Coinbase Canada and all affiliated and other group companies of those companies (including Coinbase, Inc.)."

[60] The plaintiff argues that the Canadian User Agreement adopted the jurisdiction of the Ontario courts retroactively. He argues that by including "claims and disputes that arose between us before the effective date of these terms" in the very first version of the Canadian User Agreement between Coinbase Canada and Canadian users, the agreement specifically captured claims that arose under previous user agreements with different counterparties in the Coinbase group of companies.

[61] The Canadian User Agreement launched on February 22, 2023, and was accepted by the plaintiff on May 7, 2023. The within action was commenced on November 15, 2022. The plaintiff argues it is captured by the retroactive jurisdiction and choice of law clauses contained in the Canadian User Agreement.

[62] The plaintiff also argues that the scope of the forum selection clause is broad and captures all claims "relating in any way to your access of use of the Coinbase Services, the Coinbase Platform or the Site". The Platform is maintained by Coinbase Inc. The plaintiff argues that the forum clause does not limit its application only to disputes involving Coinbase Canada, and the Canadian User Agreement specifically contemplates that Coinbase Services will be provided by the Coinbase Group.

[63] On this basis, he argues that the Coinbase defendants have consented to the jurisdiction of this court.

[64] The defendants disagree. They note that the only Coinbase counterparty to the Canadian User Agreement is Coinbase Canada, and that an argument that Coinbase Canada binds all

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wallets enabling the user to store, track, transfer, and manage Supported Digital Assets, and a Digital Asset exchange service enabling the user to obtain prices for their purchases and sales of Supported Digital assets and carry out such purchases or sales on the Site. Additional Services are those that may be made available by Coinbase Canada or another member of the Coinbase Group to users that fulfil certain eligibility criteria. They are described in Appendix 3 to the agreement, but their specific content is not relevant for this motion.

Coinbase defendants through this agreement disregards basic notions of contractual privity and corporate separateness. They also argue that the wording of the forum clause, referring to "disputes that arose between us," makes clear that the clause captures only claims or disputes against Coinbase Canada.

[65] The defendants explain the retroactivity provision of the forum clause by the fact that the Canadian User Agreement is a standard form agreement that is intended to be updated from time to time. Thus, as a drafting matter, it was important to include a retroactivity provision to ensure that a subsequent amendment to the terms would not render the dispute resolution clause meaningless.

[66] I agree with the defendants. The Canadian User Agreement is between Coinbase Canada and the Canadian users. It does not purport to bind any other party. While it operates retroactively, the language around the retroactivity is very specific and limited to disputes that arose between "us". Although "us" in defined in the Canadian User Agreement as a reference to Coinbase Canada, that interpretation of the word "us" in the forum clause is non-sensical. It can only properly be understood as a reference to the counterparties to the agreement, that is "we" and "you", defined in the Canadian User Agreement as Coinbase Canada and the Canadian user. If the language was intended to capture retroactively disputes between the Canadian user and other Coinbase entities, the clause would have referred to "disputes that arose between you and the Coinbase Group", a term that is also defined in the agreement.

[67] Accordingly, I conclude that the Canadian User Agreement does not provide a basis on which to find that this court has consent-based jurisdiction over Coinbase Global, Coinbase Europe, or Coinbase, Inc.

Dealings with Securities Regulators

[68] The plaintiff argues that during their dealings with Canadian securities regulators, the Coinbase defendants submitted to the jurisdiction of this court.

[69] As part of its application to the OSC and the AMF for registration as a restricted securities dealer and for certain exemptive relief in all jurisdictions in Canada, Coinbase Europe submitted an application form that included a "Schedule B" entitled "Submission to jurisdiction and appointment of agent for service". This Schedule provided that the Firm (defined as Coinbase Europe) "irrevocably and unconditionally submits to the non-exclusive jurisdiction of the judicial, quasi-judicial and administrative tribunals of the local jurisdiction and any administrative proceeding in the local jurisdiction, in any proceeding arising out of or related to or concerning the Firm's activities in the local jurisdiction." The Schedule was signed by an authorized signing officer of Coinbase Europe on November 18, 2021.

[70] On March 14, 2022, Coinbase Europe made an application for an exemption from the prospectus requirements of the Ontario *Securities Act*, and securities legislation in other provinces. However, as I have already noted, the Coinbase group of companies eventually decided that Coinbase Europe ought not to register in Canada, and turned to Coinbase Canada to become the registrant.

[71] The defendants point out that Coinbase Europe's application for registration as a restricted dealer was submitted in November 2021, nine months after the plaintiff's last purchase of digital assets.[5] They argue that, by taking voluntary steps to register as a restricted dealer in response to emerging policy guidance from the CSA, Coinbase Europe did not agree to expose itself to the plaintiff's historic claims for violations of Canadian securities law, and to submit to the jurisdiction of the Ontario courts in connection with those claims.

[72] The defendants argue that the submission to the jurisdiction that was part of Coinbase Europe's application is a standard requirement for foreign-domiciled applicants without a place of business in the jurisdiction to ensure that provincial securities regulators have jurisdiction to regulate the foreign applicant if the applicant is registered as a dealer. In this case, Coinbase Europe was never registered, and thus, according to the defendants, it never submitted to the jurisdiction of Canadian securities regulators or the Ontario courts.

[73] Moreover, the defendants argue that the submission to the jurisdiction was a contractual agreement with securities regulators to accept regulation, and did not extend to an agreement to retroactively accept the jurisdiction of Ontario courts over a historic claim brought by a private litigant.

[74] I agree with the defendants that the submission to the jurisdiction was neither retroactive nor retrospective. There is no language of retroactivity or retrospectivity in the submission to the jurisdiction. The Alberta Court of Queen's Bench (as it then was) has held that "very specific wording is required to impose contractual responsibility for retrospectivity relating to past events that have raised issues of tort and contractual liability, and are currently the subject of threatened litigation": *Geophysical Service Incorporated v. Murphy Oil Company Ltd.*, 2017 ABQB 464, at para. 18, citing *Trizec Equities Ltd. v. Ellis-Don Managements Services Ltd*., 1998 ABQB 1133, 66 Alta L.R. (3d) 1, at para. 591.

[75] I note that the plaintiff argues that, on a jurisdiction motion at the pre-certification stage, the court ought to focus on whether it has jurisdiction over the defendants and the subject matter of this action, and not on the claims of the proposed representative plaintiff. He argues that the time to consider the appropriateness of the proposed representative plaintiff is at certification. He also argues that even if the plaintiff's claim cannot ground jurisdiction in this case, I ought to recall that there are other class members who may have transacted in a different time period, over whose claims this court would, or could, have jurisdiction. In other words, the plaintiff would have me assess the court's jurisdiction over a claim like his, but better, about which I have no evidence, in

[5] The plaintiff transferred digital assets he purchased on another platform to his Coinbase account after he executed the Canadian User Agreement, and relies on that transfer for purposes of this motion. However, the plaintiff's claim is made under s. 133(1) of the *Securities Act* which requires the purchase of a security. No Coinbase defendant could have had an obligation to provide the plaintiff with a prospectus for a purchase he made elsewhere and then transferred to his Coinbase account. Accordingly, his claims against Coinbase had arisen before Coinbase Europe made its application for registration as a restricted dealer.

the name of efficiency. I am warned that the consequence of not doing so is that, if the claim is dismissed for want of jurisdiction, a new representative plaintiff will be found who has a stronger claim, and the court will have to deal with these issues all over again.

[76] If the plaintiff wanted to lead evidence from a class member with a stronger claim (say, a Canadian user who purchased digital assets on the Coinbase platform with Coinbase Europe after it signed the submission to jurisdiction form[6]) who was willing to become a representative plaintiff if required, he could have done so. He did not. I cannot decide this motion based on speculation of what kind of evidence some unknown class member might be able to lead that could change the jurisdiction analysis in this case.

[77] I conclude that in deciding whether this court has jurisdiction over this action, I must consider the evidence before me, which includes evidence of the plaintiff's claims, and I must not speculate as to what other evidence another class member might be able to lead with respect to their claims. The jurisdictional analysis does not ask whether the court theoretically could have jurisdiction over the defendants in a similar case. It asks whether there is jurisdiction over this case. The nature of the plaintiff's claims is relevant to that question.

[78] In this case, the plaintiff's claims arose before Coinbase Europe agreed to submit to the jurisdiction. No claims arose thereafter, because there is no evidence of any dealing in the plaintiff's Coinbase account that could possibly have required a prospectus to be delivered, even on the plaintiff's theory of liability. Without a retroactive submission to the jurisdiction of the court, the form executed by Coinbase Europe does not provide evidence of its consent to this jurisdiction.[7]

[79] In support of its claim to consent-based jurisdiction, the plaintiff also relies on a pre-registration activities undertaking directed to the AMF and other members of the Canadian Securities Administrators (the "CSA") executed on March 24, 2023 by Coinbase Canada, Coinbase Global, and Coinbase Inc. The undertaking was "in respect of pre-registration activities

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[6] In using this example, I am not finding that such a claim would fall within the jurisdiction of the court. That issue was not argued before me. I use it only to illustrate a claim that would not face this particular argument advanced by the defendants in this case, that the plaintiff's claim arose before the submission to jurisdiction form was signed, which argument I have found to be meritorious.

[7] My analysis has focused on whether the alleged consent to the jurisdiction pre-dates the time when the plaintiff's claim arose, and not the time when his claim was issued. The time of issuance of the claim is the relevant time period for presence-based jurisdiction, because presence-based jurisdiction is "based upon the requirement and sufficiency of personal service of the originating process within the province or territory of the forum": *Chevron*, at para. 83. In contrast, consent-based jurisdiction must examine the nature of the alleged consent. Consent to the jurisdiction must thus either exist before the claim arose, or be retrospective or retroactive in nature. Here, there is no evidence of consent to the jurisdiction that existed at the time the plaintiff's claims arose, nor evidence of any retrospective or retroactive consent.

conducted on the Filer's Platform in relation to clients resident in Canada during the CSA review of the Filer's application for registration and related application for exemptive relief."

[80] The undertaking defines the "Filer" as (i) Coinbase Inc. for the purposes of representations and obligations related to marketplace activities; or (ii) Coinbase Canada for the purposes of any other representations and obligations.

[81] The plaintiff argues that, by way of the undertaking, the Coinbase defendants are seeking or have sought from Canadian securities regulators registration and exemptive relief to bring their operations in compliance with the securities laws of the provinces and territories of Canada, including Ontario.

[82] The undertaking was signed by a director of Coinbase Canada, a director of Coinbase Inc. and the Chief Financial Officer of Coinbase Global. The plaintiff argues that the undertaking is further evidence of the defendants' submission to the jurisdiction of Ontario.

[83] I note that the undertakings set out in the document are undertakings of the Filer. Coinbase Global, although it has signed the undertaking, appears to have made no independent undertaking of its own.

[84] In any event, the undertaking does not include any kind of submission to jurisdiction clause. The undertakings that were made were made to securities regulators only. I cannot find any indication in this document that Coinbase Canada, Coinbase Inc. or Coinbase Global consented to the jurisdiction of the Ontario courts with respect to historical claims made by private citizens.

[85] I thus find the court has no jurisdiction over Coinbase Inc., Coinbase Global, or Coinbase Europe on the basis of consent-based jurisdiction.

Assumed Jurisdiction

[86] I turn now to the question of whether the court has jurisdiction over the defendants Coinbase Europe, Coinbase Global, or Coinbase Inc. based on assumed jurisdiction.

[87] As the Court of Appeal held in *Ontario v. Rothmans Inc.*, 2013 ONCA 353, at paras. 53-54, an Ontario court will assume jurisdiction over a foreign defendant where the plaintiff establishes a "good arguable case" for assuming jurisdiction through either the allegations in the statement of claim, or a combination of the allegations in the claim and evidence filed on the jurisdiction motion. Allegations in the pleadings are accepted as true for the purposes of the motion unless contradicted by the evidence filed: *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, at para. 38.

[88] The *Van Breda* framework requires the court to apply the real and substantial connection test, which requires a review of a list of factors that connect the legal situation or the subject matter of the litigation with the forum. The Supreme Court of Canada described the process required by the *Van Breda* framework at para. 100 of that decision:

> [T]he party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. … The presumption of jurisdiction that arises where a recognized presumptive connecting factor — whether listed or new — exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action …

[89] To rebut the presumption of jurisdiction that arises when a presumptive connecting factor exists, the defendant must "establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Van Breda*, at para. 95. In these circumstances, "it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction": *Van Breda*, at para. 97.

[90] The jurisdictional analysis focuses on the objective factors that connect the legal situation or subject matter of the litigation to the forum: *Van Breda*, at para. 82. It also has a temporal element: *Vale SCJ*, at para. 56.

[91] The application of presumptive connecting factors must be viewed from the perspective of the defendant who is disputing jurisdiction. In other words, there must be an unrebutted presumptive connecting factor linking each defendant to Ontario for the court to assume jurisdiction over that defendant: *Sinclair v. Amex Canada Inc.*, 2023 ONCA 142, at para. 18, leave to appeal to S.C.C. granted, 2024 CarswellOnt 175; *Vale SCJ*, at para. 22.

[92] The plaintiff disagrees that the analysis must be undertaken for each defendant. He relies on *Sakab Saudi Holding Company v. Jabri*, 2022 ONCA 496, at para. 44, where the Court of Appeal held that there was no need to mechanically or expressly run through the *Van Breda* factors with respect to each defendant where the defendants are alleged to have acted in an interconnected way and under the direction of a single controlling mind. I note that in *Sakab* the allegations involved a conspiracy between the defendants to orchestrate a fraudulent scheme. The Court of Appeal found that it was implicit in the motion judge's analysis that a *prima facie* case of conspiracy had been made out with respect to each defendant, and that the motion judge's finding of jurisdiction "was tightly connected with the allegation of conspiracy and the parties' respective roles in carrying out the conspiracy from Ontario": at para. 46.

[93] While I accept the Court of Appeal's ruling in *Sakab*, in my view, it does not apply in this case. There are no allegations of fraud or conspiracy; this is a statutory claim. Here, each defendant occupies different roles in the Coinbase group structure. Undertaking the *Van Breda* analysis for each defendant would not be a "mechanical" exercise, as the court found it would have been in *Sakab*. There is no principled reason in the context of this statutory claim to do away with the requirement, described most recently in *Sinclair*, that jurisdiction must be established with respect to each defendant.

[94] Moreover, the plaintiff's theory of interconnected action amongst the defendants, and interconnected responsibility for the class's alleged losses, rings of the group enterprise theory of liability, about which the Court of Appeal wrote, in *Chevron*, 2018 ONCA 472, 141 O.R. (3d) 1, at para. 76:

> [Group enterprise liability theory] holds that where several corporations operate closely as part of the same 'group' of corporations, they are in reality a single enterprise and should, accordingly, be responsible for each other's debts. It has been consistently rejected by our courts…

[95] Accordingly, I conclude that, for purposes of my analysis, there must be an unrebutted presumptive connecting factor with respect to each of Coinbase Europe, Coinbase Inc., and Coinbase Global for this court to have jurisdiction over each individual entity.

[96] The presumptive connecting factors in tort cases were identified in *Van Breda*, at para. 90:

a. the defendant is domiciled or resident in the province;

b. the defendant carries on business in the province;

c. the tort was committed in the province; and

d. a contract connected with the dispute was made in the province.

[97] In this case, the plaintiffs rely on two presumptive connecting factors: (a) the defendants were carrying on business in Ontario; and (b) the statutory tort was committed in Ontario.

Carrying on Business in Ontario

[98] I have already explained, in my analysis of presence-based jurisdiction, that none of Coinbase Europe, Coinbase Inc. or Coinbase Global carry on business in Ontario. To the extent that the "carrying on business" standard is lower for assumed jurisdiction than for presence-based jurisdiction, I find that the lower standard is also not met in this case, for the same reasons I articulate in my analysis of presence-based jurisdiction.

Tort Committed in Ontario

[99] That leaves the question of whether the statutory tort was committed in Ontario.

[100] A tort occurs in the jurisdiction substantially affected by the defendant's activities or its consequences, or where the important elements of the tort occurred. The court adopts a flexible and pragmatic approach when determining the situs of a tort for jurisdictional purposes: *Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP*, 2020 ONSC 934, 149 O.R. (3d) 466, at para. 59.

The Statutory Framework

[101] The plaintiff's claim is founded on ss. 71(1) and 133(1) of the *Securities Act*. Section 71(1) provides:

> A dealer not acting as agent of the purchaser who receives an order or subscription for a security offered in a distribution to which subsection 53(1) or section 62 is applicable shall, unless the dealer has previously done so, send by prepaid mail or deliver to the purchaser the latest prospectus and any amendment to the prospectus filed either before entering into an agreement of purchase and sale resulting from the order or subscription or not later than midnight on the second day, exclusive of Saturdays, Sundays and holidays, after entering into such agreement.

[102] Section 133(1) provides, among other things, that a purchaser of a security to whom a prospectus was required to be sent or delivered, but was not sent or delivered in compliance with s. 71(1), has a right of action for rescission or damages "against the dealer or offeror who failed to comply" with the requirement under s. 71(1).

[103] The plaintiff alleges that his action claims against the defendants as both dealers and offerors. The language of his claim engages the "issuance, distribution, and sale of securities". The defendants argue that the claim only clearly pleads a cause of action against the defendants *qua* dealer, although there is no debate that at the relevant time, no defendant was a registered dealer under the *Securities Act*.

[104] "Dealer" is defined in s. 1 of the *Securities Act* as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in securities as principal or agent."

[105] "Offeror" is not defined in the *Securities Act*, but is used in National Instruments 62-103 in connection with takeover bids. The defendants argue that the implication is that "offeror" in s. 133(1) refers to a person who makes a takeover bid, issuer bid, or an offer to acquire. In support of this argument, they rely on the fact that s. 133(1) also creates a right of action in favour of a "security holder to whom a take-over bid and take-over bid circular or an issuer bid and an issuer bid circular" were required to be sent or delivered, but were not.

[106] For his part, the plaintiff argues that the *Securities Act* defines "offering memorandum" with regard to the sale of securities by an issuer, consistent with other provisions of the *Securities Act* relating to prospectuses: ss. 53, 56 and 58. Thus, the plaintiff argues, offeror in s. 133(1) must mean issuer, and he claims against the Coinbase defendants as the parties offering securities (the digital assets[8]) for sale.

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[8] The parties take differing views on whether the digital assets are securities, but that is a merits question outside the scope of these reasons.

[107] In summary, the plaintiff claims that the Coinbase defendants are dealers and issuers who had the obligation to deliver a prospectus to the class members before offering the digital assets for sale, and they failed to do so, leading to their liability.

[108] The parties agree that no prospectus was delivered. They also agree that no prospectus was ever filed with the Ontario Securities Commission. The defendants argue that alone is fatal to the plaintiff's claims. They rely on *Jones v. F.H. Deacon Hodgson Inc.* (1986), 56 O.R. (2d) 540 (H.C.J.), where the court found that liability of a dealer under the predecessor to s. 133(1) for failure to comply with the requirement in the predecessor to s. 71(1) did not assist a purchaser unless the dealer fails to provide the purchaser with a prospectus filed with the commission. "[I]f none is filed there is no breach as no such prospectus exists. There is a lacuna."

[109] This brief review of the statutory framework behind the plaintiff's claims demonstrates that a number of issues are in play between the parties on the merits of the litigation, assuming this motion resolves in favour of the plaintiffs. Are the digital assets securities? Were the defendants, or any of them, issuer or dealers under the *Securities Act*? Given that no prospectus was filed with the commission, can liability arise under s. 133(1)?

[110] I need not delve into those issues for the purposes of this motion. It suffices to point out that the issues exist to assist in understanding the nature of the cause of action alleged in this case, and the scope of the parties' disagreements about it.

Where was the alleged tort committed?

[111] The plaintiff argues the tort was committed in Ontario because important elements of the pleaded statutory cause of action occurred in Ontario and because Ontario is the jurisdiction substantially affected by the trading occurring on Coinbase's Platform. The class members reside in Canada and suffered their losses in Canada.

[112] He argues that the statutory cause of action is engaged because the *Securities Act* applies to his claim, and it has extraterritorial reach. The submission that the *Securities Act* has extraterritorial reach is only partially correct. As the court described in *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 7957, at para. 398, "the *Securities Act* has extraterritorial application where the conduct at issue has a 'real and substantial connection' to Ontario." The *Securities Act* does not create jurisdiction by applying extraterritorially; rather, where there is jurisdiction, the *Securities Act* will apply extraterritorially. Similarly, in *Kaynes v. BP, PLC*, 2014 ONCA 580, at paras. 31-33, a case relied on by the plaintiff, the *Securities Act* had extraterritorial application because the defendant was a "responsible issuer", defined in s. 138.1 of the *Act* to include a "reporting issuer" or "any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded."

[113] The plaintiff argues that Ontario has jurisdiction because the *Securities Act* applies, alleging that because the plaintiff resides in Ontario he is thus entitled to receive a prospectus in Ontario. In my view, this argument is inconsistent with the jurisprudence exemplified by *Catalyst*. The entitlement to receive a prospectus in Ontario is not an element of the tort for the purposes of

a jurisdictional analysis. Rather, the entitlement to receive a prospectus in Ontario can only arise if first there is a real and substantial connection to the jurisdiction.

[114] To determine the situs of the alleged tort, I must ask myself where important elements of the statutory cause of action occurred, and whether Ontario is the jurisdiction substantially affected by the trading occurring on the Coinbase Platform.

[115] With respect to the important elements of the cause of action:

a. The plaintiff's purchase of the alleged securities occurred in Ireland through Coinbase Europe;

b. The contractual relationship between the plaintiff and Coinbase Europe was formed in Ireland;

c. The steps to accept, execute, and fulfil any trades in digital assets on the Coinbase Platform occurred outside Ontario;

d. The physical server infrastructure used to operate the Coinbase Platform is located outside Ontario;

e. The plaintiff accessed the Coinbase Platform to execute trades in digital assets from his home computer in France, and then from his home computer in Ontario.

[116] The only element of the alleged tort, other than the plaintiff's damages, that occurred in Ontario is the plaintiff's location when he accessed the Coinbase Platform at certain times.

[117] Assuming that the plaintiff's decision to access the Coinbase Platform from Ontario is a connecting factor, in my view, the defendants have rebutted it. The access of the platform from Ontario points to only a weak relationship between the forum and the subject matter of the litigation. The plaintiff could have accessed the Coinbase Platform from wherever he happened to be on the planet as long as he had a wifi or data connection. I conclude that, viewed practically, it would not be reasonable for the defendants to expect that they would be called to answer proceedings in Ontario in the circumstances where almost every element of the alleged tort occurred outside Ontario and only a relatively minor element of the tort occurred in Ontario: *Van Breda*, at paras. 96-97.

[118] My conclusion is consistent with the decision in *Yip*, where a plaintiff accessed disclosure documents from Ontario and used his home computer to trade over a foreign exchange. The court concluded that any presumptive connecting factor that the tort occurred in Ontario was rebutted, because accessing the disclosure documents in Ontario and trading from Ontario was an extremely weak connection: *Yip SCJ*, at para. 211.

[119] The plaintiff argues that I ought to consider the failure to receive a prospectus to be akin to "failure to warn" cases, where the *situs* of the tort is the place where the warning ought to have been received: *Thorne v. Hudson*, 2016 ONSC 5507, at para. 32. In my view, adopting this analysis

would result in elevating what has already been recognized to be a weak connecting factor to a controlling factor. In addition, because the "failure to warn" in the analogy is the failure to deliver a prospectus, which is a statutory requirement, this argument again relies on the extraterritorial application of the *Securities Act* to ground jurisdiction, rather than a real and substantial connection grounding extraterritorial application of the *Securities Act*, and is thus inconsistent with the jurisprudence on the point: *Catalyst*.

[120] If the plaintiff's choice to use his home computer in Ontario to conduct trades on the Coinbase Platform were sufficient to ground jurisdiction, every jurisdiction in the world where anyone purchased digital assets on the Coinbase Platform would also have jurisdiction. This universal jurisdiction is exactly what our courts have cautioned against: *Yip SCJ*, at para. 213; *Leon v. Volkswagen AG*, 2018 ONSC 4265, at para. 35.

[121] The plaintiff argues that if it is reasonably foreseeable that the defendants' conduct (here, on the plaintiff's theory, failing to deliver a prospectus) would impact clients in Ontario, then the forum where the plaintiff suffers damage is entitled to exercise judicial jurisdiction over that foreign defendant: *Kaynes*, at para. 27.

[122] To the extent that the plaintiff relies on the fact that he suffered damages in Ontario as a presumptive connecting factor, that factor was rejected in *Van Breda*, at para. 89.

[123] However, the argument may be made in support of the plaintiff's claim that the *situs* of the tort is Ontario because Ontario is the jurisdiction substantially affected by the defendants' conduct. In support of this argument, the plaintiff also relies on crypto-asset surveys conducted by the OSC that found that Coinbase is the most used crypto-trading platform in Canada, and references the attention that Canadian securities regulators have directed at crypto-trading platforms, demonstrating the impact that Coinbase's activities have on Ontario's capital markets.

[124] I have difficulty with this submission. The plaintiff's argument establishes that Ontario is affected by crypto-asset trading platforms. But is Ontario the jurisdiction substantially affected by the conduct of Coinbase Europe, Coinbase Inc. and Coinbase Global? In all of the circumstances, it is not. Other jurisdictions, such as Ireland, where Coinbase Europe was domiciled and made its contracts, or the jurisdictions where Coinbase Inc. operates the Coinbase Platform, are more affected. Ontario is a jurisdiction affected by the Coinbase Platform, in the same way any of a number of jurisdictions are, if clients choose to execute trades on the Coinbase Platform from those jurisdictions. For the reasons I have already explained, this is a weak connecting factor that has been, in my view, rebutted.

[125] I thus conclude that there is no basis for this court to assume jurisdiction over Coinbase Europe, Coinbase Global, or Coinbase Inc. The action against these defendants must therefore be dismissed.

Should the action be permanently stayed on the basis of *forum non conveniens*?

[126] In view of my conclusion that this court has jurisdiction over only Coinbase Canada, it is necessary to consider whether the action against Coinbase Canada should be permanently stayed on the basis of *forum non conveniens*.

[127] In *Van Breda*, at para. 103, the Supreme Court held that:

> If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[128] A non-exhaustive list of factors that may be considered when determining whether a court should decline to exercise its jurisdiction include those identified by the Supreme Court of Canada in *Van Breda*, at para. 110:

> the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

[129] With respect to loss of juridical advantage as a factor in the *forum non conveniens* analysis, the Supreme Court urged caution in *Van Breda*, at para. 112:

> This factor obviously becomes more relevant where foreign countries are involved, but even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction. At this point, the decision falls within the reasoned discretion of the trial court.

[130] To displace the plaintiff's chosen forum, the defendant must demonstrate that its chosen forum is "clearly more appropriate". The normal state of affairs is that jurisdiction should be exercised once it is properly assumed: *Van Breda*, at paras 103, 108-109.

[131] The plaintiff argues that this court ought not to decline to exercise its jurisdiction because (i) the Canadian User Agreement selects Ontario as the forum for dispute resolution; (ii) the plaintiff is resident in Ontario, while the defendants are a remote-first workforce located in many jurisdictions, and in any event, in the current environment, location of witnesses no longer carries any weight in the forum analysis; and (iii) the selection of another forum would entail the loss of

a legitimate juridical advantage because the defendant's proposed forum, Ireland, has no legislative framework to facilitate class actions, does not permit contingency fees or third-party litigation funding, and would entail significant costs for the plaintiff to pursue his claim there.

[132] The plaintiffs submit that digital assets are securities. The defendants argue that if this is the case, there is a presumption, founded on comity, that securities regulation should take place in the forum in which the securities transaction took place: *Kaynes*, at para. 41; *Yip SCJ*, at para. 271; *Leon*, at para. 18. The plaintiffs say there is no such presumption.

[133] The defendants argue that Ireland is the clearly more appropriate forum. They rely on evidence from their expert[9] that Ireland has a comprehensive scheme for the regulation of financial instruments or securities which substantially mirrors the substantive provisions of the *Securities Act* relied upon by the plaintiff in this action. Moreover, Ireland has developed its own approach to the regulation of digital assets. The evidence indicates that Irish courts would assume jurisdiction arising out of an alleged improper distribution of securities through Coinbase Europe.

[134] I have determined that the circumstances of this case make it appropriate for me to exercise my discretion to decline to exercise jurisdiction. Ireland is a clearly more appropriate forum. I reach this conclusion for the following reasons.

[135] First, the plaintiff only traded in digital assets when his contractual relationship was with Coinbase Europe. At that time, Coinbase Canada was present in Ontario, but its business was unconnected to the plaintiff's claim. Coinbase Canada later became the counterparty to the plaintiff's user agreement, but that occurred after the plaintiff's claims arose. There is no evidence that the plaintiff ever transacted a purchase or sale on the Coinbase platform at a time when Coinbase Canada was the counterparty to his user agreement. Thus, the forum selection clause in the Canadian User Agreement does not apply to the plaintiff's claims, because they pre-date the Canadian User Agreement.

[136] Another plaintiff who transacted on the Coinbase Platform when Coinbase Canada was the counterparty to the user agreement might have a different case. But in this analysis, I must focus on the plaintiff's case, not on some other hypothetical user's case with different facts.

[137] If the plaintiff's case against Coinbase Canada proceeds, given Coinbase Canada's minor, if any, role in the events, it ought to proceed with the case against the other defendants, over whom

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[9] The plaintiff did not object to the admission of the evidence led by the proposed expert in Irish law. However, even without any objection, the court has a gatekeeping responsibility. I have considered the elements of the test laid out in *R. v. Mohan*, 1994 CanLII 80 (SCC) and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. The evidence led with respect to Irish law is both necessary and relevant. The expert is properly qualified, and no exclusionary rule applies. There is no reason to exercise my discretion to exclude the expert evidence. On balance, its value outweighs the potential risks of the admission of expert evidence. I thus qualify the expert to give evidence on the law of Ireland.

this court has no jurisdiction. Any other decision both has the potential to waste judicial resources and lead to conflicting decisions of different courts.

[138] The loss of juridical advantage advanced is the loss of a class action framework, which is not present in Ireland.

[139] In *Leon*, Belobaba J. found that the loss of access to a class action procedure that was not available to the plaintiff (in that case, in Germany) was of no import: "Ontario courts have consistently deferred to jurisdictions with no class proceedings, a deference that reflects the importance accorded to comity in the forum analysis": at para. 44.

[140] Comity will often prevail over any perceived loss of juridical advantage: *Kaynes*, at paras. 53-54; *Van Breda*, at para. 112.

[141] Accordingly, despite the lack of a class proceedings framework in Ireland, for the other reasons I have explained, I conclude that Ontario is a *forum non conveniens* with respect to Coinbase Canada, and that Ireland is a clearly more appropriate forum.

[142] The action against Coinbase Canada is thus stayed permanently on the basis of *forum non conveniens*.

Does the *Securities Act* apply to the plaintiff's extra-territorial trades?

[143] The defendants make an argument in their factum that the *Securities Act* does not apply to the plaintiff's extraterritorial trades because there is not a sufficient connection between Ontario, the subject matter of the *Securities Act*, and the plaintiff's purchases through Coinbase Europe to ground jurisdiction over the plaintiff's historic transactions.

[144] I have already concluded that the action against Coinbase Europe, Coinbase Inc., and Coinbase Global must be dismissed for want of jurisdiction, and that the action against Coinbase Canada must be stayed permanently on the basis of *forum non conveniens*. I thus conclude it is not necessary to address this issue.

Motion to Strike

[145] The defendants moved to strike the plaintiff's experts' affidavits, and at least some of the affidavit filed by a lawyer at class counsel's firm.

[146] As it turns out, having written my reasons on the merits, I did not find it necessary to refer to any of the impugned evidence.

[147] This court is facing a significant backlog. In the interests of efficiency, and considering the need to devote resources to other cases, I decline to adjudicate this motion. In view of my conclusions on the jurisdiction and *forum non conveniens* motion, it is not necessary to do so.

Costs

[148] At the hearing of the motion, I proposed that the parties deliver costs submissions following the hearing, which I would review only after I wrote my reasons on the merits. The parties were agreeable to my proposal. I have thus followed this process.

[149] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 22.

[150] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[151] The defendants are the successful parties on the motion and as such are presumptively entitled to their costs.

[152] The defendants' cost outline with respect to the jurisdiction and *forum non conveniens* motion supports costs of $542,097.30, inclusive of HST and disbursements on a partial indemnity scale. Their costs outline with respect to the motion to strike evidence supports partial indemnity costs in the amount of $40,312.66.

[153] The plaintiff's cost outline with respect to the jurisdiction and *forum non conveniens* motion, and the motion to exclude evidence, supports partial indemnity costs of $195,321.39, all inclusive.

[154] There are no offers to settle.

[155] With respect to the motion to exclude evidence, I note that (i) whether the evidence was improper did not need to be adjudicated because the impugned evidence was not necessary for the motion in any event; and (ii) the defendants could have argued that I should not admit or decline to consider, or place no weight on, the impugned evidence in the course of their argument on the jurisdiction and *forum non conveniens* motion without having brought a separate motion.

[156] The evidence that was the subject of the motion, and the motion itself were, in my view, examples of over-lawyering. I decline to award any costs to either party in respect of the motion to exclude evidence.

[157] There is no reason to award costs on anything other than a partial indemnity scale with respect to the jurisdiction and *forum non conveniens* motion.

[158] In considering the amount of costs that is fair and reasonable, I note the following:

a. The motion was not complex from a jurisprudential standpoint, but there was novelty in that the settled law had to be applied to an emerging context, that is, digital trading platforms;

b. Counsel's partial indemnity rates are similar to one another's;

c. Significant work went into the motion records;

d. The plaintiffs adduced some evidence that was not necessary for the purposes of the motion, but which added to the costs of the motion for the defendants;

e. The motion was very important to all parties;

f. The defendants spent far more time on the motion than the plaintiff, leading to a claim for partial indemnity costs that, in my view, would be outside the reasonable expectations of the plaintiff.

[159] In all the circumstances of the jurisdiction and *forum non conveniens* motion, I conclude that an award of partial indemnity costs in the amount of $250,000, all-inclusive, to be paid by the plaintiff to the defendants, within 60 days, is fair and reasonable.

Conclusion

[160] In summary, I make the following orders:

a. This court has no jurisdiction to hear this action against Coinbase Europe, Coinbase Inc., and Coinbase Global. The action against them is dismissed on that basis;

b. The action against Coinbase Canada shall be permanently stayed on the basis of *forum non conveniens*;

c. The plaintiff shall pay to the defendants the all-inclusive sum of $250,000 in costs for the jurisdiction and *forum non conveniens* motion within 60 days;

d. No costs shall be ordered with respect to the motion to exclude evidence.

J.T. Akbarali J.

Date: March 21, 2024