IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Smiley v. The Pierre Elliott Trudeau Foundation*, 2023 NLSC 107
Date: July 19, 2023
Docket: 202201G1124

BETWEEN:

CHERRY SMILEY

PLAINTIFF

AND:

THE PIERRE ELLIOTT TRUDEAU FOUNDATION and STEPHEN KAKFWI

DEFENDANTS

Before: Justice Peter N. Browne

Place of Hearing:	St. John's, Newfoundland and Labrador
Dates of Hearing:	June 21, 2022; February 9-10, 2023; June 6, 2023

Summary:

The Defendant, The Pierre Elliott Trudeau Foundation, applied to have the proceeding brought by Smiley stayed under Rule 6.07(7)(b).

The Court granted the application having determined that the Defendant had discharged its evidentiary and legal burden under the *forum non conveniens* analysis. The Province of Quebec was clearly the more appropriate forum to

hear the action. Should a Quebec court refuse to hear the matter, or any portion thereof, the parties were granted leave to apply to have the stay lifted.

Appearances:

Kathryn Marshall	Appearing on behalf of the Plaintiff Cherry Smiley
Colm St. Roch Seviour, K.C. and Koren A. Thomson	Appearing on behalf of Defendant The Pierre Elliott Trudeau Foundation
J. David B. Eaton, K.C.	Appearing on behalf of Defendant Stephen Kakfwi

Authorities Cited:

CASES CONSIDERED: *Brake v. Phelps Drilling Co.*, 2009 NLTD 91; *Haaretz.com v. Goldhar*, 2018 SCC 28; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17; *Pro Transport Inc. v. ABB Inc.*, 2017 NBQB 241; *Unifor Local 2002 v. Exploits Valley Air Services Ltd*, 2023 NLCA 3; *Jafarzadehahmadsargoorabi v. Sabet*, 2011 ONSC 5827; *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, [2016] 1 S.C.R. 851; *Breeden v. Black*, 2012 SCC 19; *Re Clark Estate*, 2021 MBQB 23; *Smith v. Belanger*, 2009 ABQB 23; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T & N PLC,* [1993] 4 S.C.R. 289; *Young v. Tyco International of Canada Ltd.*, 2008 ONCA 709; *Judson v. Mitchele*, 2011 ONSC 6004; *R. v. Spied* (1983), 43 O.R. (2d) 596, 3 D.L.R. (4th) 246 (Ont. C.A.); *Simmons v. Royal Newfoundland Constabulary Public Complaints Commission*, 2022 NLSC 27; *Rashidan v. National Dental Examining Board of Canada*, 2020 ONSC 4174; *Kahlon v. Cheecham*, 2010 ONSC 1957; *Formula Contractors Ltd. v. Lafarge Canada Inc.*, 2009 BCSC 105

STATUTES CONSIDERED: *Quebec Civil Code*, C.C.Q.-1991*; Judicature Act*, R.S.N.L. 1990, c. J-4

RULES CONSIDERED: *Rules of the Supreme Court, 1986* S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

BROWNE, J.:

OVERVIEW

[1] The parties request this Court to determine whether the Plaintiff, Cherry Smiley, can continue with her civil action in tort and contract or whether it is "clearly more appropriate" that the action be tried in the Province of Quebec.

[2] The Defendant, the Pierre Elliott Trudeau Foundation, requests this Court to grant an order staying the proceedings, or in the alternative, that it set aside the Statement of Claim. Smiley and the Second Defendant, Stephen Kakfwi, oppose the application.

[3] The Foundation argues there is a substantial and meaningful connection with the Province of Quebec; therefore, the litigation should be conducted there rather than in the Province of Newfoundland and Labrador.

[4] The Foundation is a federally registered non-partisan charity based in Montreal. Its purpose is to provide financial support to creative and critical thinkers who contribute to social issues by way of scholarship in the following areas: (i) human rights and dignity; (ii) responsible citizenship; (iii) Canada's role in the world; and (iv) people in their natural environment. It accomplishes this mandate through a network of pairing scholars with mentors using an application and vetting process.

[5] Smiley became a scholarship recipient because of her doctoral work and research at Concordia University in Montreal. She signed a Memorandum of

Agreement ("MOA") on June 2, 2016, which contains a choice of law clause that expressly provides it "shall be governed by and interpreted and enforced in accordance with the law of the Province of Quebec and the laws of Canada applicable therein", (see para. 11.11 of the MOA).

[6] Smiley alleges she attended a three-day Foundation event held in St. John's on June 3-6, 2018, known as the Summer Institute, where she met her mentor Kakfwi for the first time.

[7] On June 3, 2018, following a dinner at a local St. John's restaurant, Smiley and Kakfwi shared a taxi back to their hotel. As they were saying good night in the lobby Kakfwi suddenly moved his body extremely close to hers, grabbed her upper arm close to her breasts and proceeded to massage and rub her arm for an extended period.

[8] A similar incident occurred on the evening of June 6, 2018 at the gala dinner ("the Incidents"). On this occasion, Kakfwi also invited Smiley to visit his home in Yellowknife where she could stay in his spare bedroom.

[9] The Incidents caused Smiley to become fearful due to the prospect that she was required to obtain a reference letter from Kakfwi in order to receive her subsequent year of scholarship funding.

[10] The Foundation states it does not carry on business or have permanent presence in Newfoundland and Labrador. As a non-profit body, it does not own real estate and its only assets are located in Quebec. The President and CEO, Pascale Fournier, resides in Montreal[1].

[1] Subsequent to the hearing of evidence in this matter, Fournier and several board members resigned due to a matter unrelated to this proceeding.

[11] The pleadings allege: (i) sexual battery including vicarious liability; (ii) breach of fiduciary duty in the creation of the mentorship and include, specifically, the Foundation's response to Smiley's allegations regarding the Incidents; (iii) breach of the contractual duty of good faith and honesty in contractual performance; and (iv) breach of confidence and privacy.

[12] The Foundation argues the factual allegations that underpin these causes of action, with the exception of the sexual battery, do not relate to events that occurred in the Province of Newfoundland and Labrador; instead, they reflect events that occurred in the Province of Quebec prior to and subsequent to the Incidents.

[13] It produced affidavits confirming that under the *Quebec Civil Code*, C.C.Q.-1991 there are comparable actions and remedies to those Smiley seeks here. Therefore, she could assert each of her causes of action before a Quebec Superior Court (see para. 27 of the Affidavit of Jean-Pierre Sheppard, a partner with Robinson Sheppard Shapiro LLP in Montreal).

[14] For the reasons that follow, I conclude that the Province of Quebec is the preferred, and clearly more appropriate, forum to hear Smiley's claims.

PRELIMINARY ISSUES

The Foundation's application regarding scandalous portions of the Smiley affidavit and news articles introduced by Smiley's legal counsel

[15] Before addressing the main issues, I wish to deal with two preliminary issues raised by counsel for the Foundation. The first concerns select portions of Smiley's reply affidavit they consider "scandalous". They request these portions be struck pursuant to Rule 14.24 (see paragraphs 6, 7, 16 and 19 of the Smiley Affidavit). The second concerns two news articles introduced by Smiley's legal counsel during final argument regarding unrelated events at the Foundation that occurred subsequent to Fournier's testimony. They assert these articles constitute hearsay.

[16] In response to the application to strike Smiley's counsel conceded there are aspects of her client's affidavit that are "colorful and descriptive", but she disagrees with the Foundation's legal counsel that they meet the Rule 14.24 threshold of "scandalous". In response to the news articles provided in her supplemental list of authorities, Smiley's counsel informed the Court that they were not evidence meant to impeach Fournier's evidence. Rather, their purpose was to demonstrate Smiley's concerns over her client's lack of trust in the Foundation.

[17] Because both issues have no bearing on my analysis regarding the selection of the clearly more appropriate forum, I afford them no weight.

MAIN ISSUE(S)

[18] The parties agree that the main issue is whether the Foundation can discharge the evidentiary burden of demonstrating to this Court that it should set aside or stay the Statement of Claim.

[19] In addressing this issue, the Court must examine the following sub-issues:

(a) Jurisdiction *simpliciter*: Is there a real and substantial connection to the Province of Quebec?

(b) *Forum non-conveniens*: Should there be a real and substantial connection to Quebec, then is Quebec the preferred and clearly most appropriate forum for Smiley's claims against both the Foundation and Kakfwi?

ANALYSIS

Sub-Issue No. 1: Jurisdiction *simpliciter*: Is there a real and substantial connection to the Province of Quebec?

[20] The answer to this question is yes. The Province of Quebec has a real and substantial connection to the claims of: (i) breach of fiduciary duty; (ii) breach of the contractual duty of good faith and honesty in contractual performance; and (iii) breach of confidence and privacy. Smiley was a resident of the City of Montreal when she executed her MOA and subsequently complained to the Foundation about the Incidents.

[21] The sexual battery occurred in Newfoundland and Labrador while Smiley and Kakfwi were visiting the Province to attend the Foundation's Summer Institute held in June 2018.

RELEVANT RULES OF COURT AND LEGAL PRINCIPLES

(a) *The Rules of the Supreme Court, 1986*: Rules 10.05(2) and 6.07(7)

[22] Rule 10.05(1)(b) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D permits a Court to consider such an application without the party having attorned to the jurisdiction of the Court. A defendant may subsequently challenge the service, the jurisdiction, or the exercise of the Court's jurisdiction under Rule 6.07(7).

[23] Like Rule 10.05(1)(b), established jurisprudence states that rule 6.07(7) may be relied upon to challenge the Court's jurisdiction, or the exercise of jurisdiction, over an action (see *Brake v. Phelps Drilling Co.,* 2009 NLTD 91).

[24] While Rule 6.07(7) uses the term "stay", the power to render a stay stems from section 97(1) of the *Judicature Act*, R.S.N.L. 1990, c. J-4, which authorizes the Court to direct "a stay of proceedings pending before [the Court]."

(b) The distinction between the common law principles of Jurisdiction *Simpliciter* and *Forum Non Conveniens*

[25] In determining the appropriate forum or jurisdiction for a matter, there is a distinction between "jurisdiction *simpliciter*" and "*forum non conveniens*". The Supreme Court of Canada explained the distinction in a very succinct manner in *Haaretz.com v. Goldhar*, 2018 SCC 28 (see paras. 27-28).

[26] The **jurisdiction *simpliciter*** analysis ensures a court has jurisdiction over a matter when a "**real and substantial connection**" exists between a chosen forum and the subject matter of the litigation. The **real and substantial connection test prioritizes order, stability and predictability** by relying on objective connecting factors for the assumption of jurisdiction.

[27] The ***forum non-conveniens* analysis** guides courts in determining whether they should decline to exercise that jurisdiction in favour of a "**clearly more appropriate**" forum.

[28] The take away message from *Haaretz.com* is that after considering the real and substantial connection test, I must then determine whether this Court has jurisdiction *simpliciter* over the proceeding. Should I determine that it does, I then move to consider a *forum non-conveniens* argument. The *forum non-conveniens* argument only applies if this Court determines that it has jurisdiction *simpliciter*.

POSITION OF THE PARTIES

The Foundation

[29] The Foundation argues that in circumstances where there is a basis for both the courts of Newfoundland and Labrador and Quebec to have jurisdiction *simpliciter* then this Court must then proceed to the *forum non-conveniens* analysis to determine which forum is clearly the most appropriate.

[30] With regard to the real and substantial test for jurisdiction *simpliciter*, the *locus* of the tort of sexual battery is the only presumptive factor that connects the proceeding to this jurisdiction.

[31] Quebec is the more appropriate forum for six reasons:

1. None of the parties are domiciled here.
2. The Foundation does not carry on business here.
3. The choice of law clause in the MOAs selects the law of Quebec as applying.
4. The ‘last act’ essential to the formation of the MOA for both Smiley and Kakfwi was the signature of the Foundation’s CEO who was resident in Montreal.
5. The legal requirement for Smiley and Kakfwi to attend the Summer Institute arises from an interpretation of the MOAs; and
6. Most importantly, the majority of the allegations concern events that occurred in Montreal.

Smiley

[32] The parties agree that the *locus* of the sexual battery is Newfoundland and Labrador, but fundamentally disagree as to the legal foundation of the entire proceeding.

[33] According to Smiley's counsel, the proceeding is essentially a personal injury case (sexual battery) that involves joint and several liability (the Foundation and Kakfwi) and is not a contractual dispute. Smiley pleads the tort of breach of fiduciary duty (see para. 55, sub-paras. (a) - (o) of the Statement of Claim); and the common law contractual obligation of breach of duty of good faith and honesty in contractual performance (see paras. 63-65).

Kakfwi

[34] Kakfwi's counsel agrees with the position advanced by Smiley's counsel that the factual and legal core of the action is the tort of sexual battery. The connection to Newfoundland and Labrador is strong; whereas the connection to Montreal is not, as his client has attorned to this jurisdiction by filing a Defence.

[35] He posits that the issues between the parties do not fit nicely under the jurisdiction *simpliciter* doctrine or the *forum non-conveniens* doctrine, but are somewhere in-between.

[36] Using the principles of order, stability and predictability when applying the jurisdiction *simpliciter* test of "real and substantial connection", the Court must rely on objective connecting factors for the assumption of jurisdiction.

Applicable law and findings

[37] In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 ("*Van Breda*"), at paragraph 90, the Supreme Court of Canada identified four presumptive connecting factors which, *prima facia*, entitles a court to assume jurisdiction *simpliciter*. They are as follows:

> **(i) the defendant is domiciled or resident in the province;**
>
> **(ii) the defendant carries on business in the province;**
>
> **(iii) the tort was committed in the province; and**
>
> **(iv) a contract connected with the dispute was made in the province.**

[38] In *Pro Transport Inc. v. ABB Inc.*, 2017 NBQB 241, Justice LaVigne noted the four presumptive connecting factors are not exhaustive (see para. 30).

[39] Our Court of Appeal in *Unifor Local 2002 v. Exploits Valley Air Services Ltd*, 2023 NLCA 3, held that ordinarily when a court has jurisdiction to hear a matter, the plaintiff is entitled to be heard in that court; should the defendant choose to oppose the proceeding, it must do so in that court. When another court also has jurisdiction *simpliciter* to hear the matter, the defendant can ask the court chosen by the plaintiff to decline to exercise its jurisdiction in favour of the jurisdiction of that other court (see para. 11, quoting *Van Breda*, at para. 109).

The defendant is domiciled or resident in the province

[40] The evidence before the Court was clear; none of the parties or any potential witnesses reside in Newfoundland and Labrador, whereas several of the Foundation witnesses reside in Montreal, making this a natural forum geographically.

The Defendant carries on business in the province

[41] The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction such as maintaining an office there or regularly visiting the territory of the particular jurisdiction (see para. 87 of *Van Breda*; and para. 42 of *Jafarzadehahmadsargoorabi v. Sabet*, 2011 ONSC 5827*).*

[42] I accept the evidence of Pascale Fournier that while the Foundation has a Canada-wide mandate, its head office and its business records are located in Montreal.

[43] The Foundation was created in 2001 through a special endowment fund from the Government of Canada, the terms of which require the organization to finance its activities exclusively from interest and investment generated from the fund's capital. Fournier and her predecessor, Morris Rosenberg, confirmed that one of the key expectations of scholars and mentors is that they attend the Summer Institute program held annually in various locations around the country.

The tort was committed in the province

[44] The pleadings establish that the tort of sexual battery occurred during the Foundation's Summer Institute held in St. John's in June 2018. The connection between the remaining three issues: (i) breach of fiduciary duty (ii) breach of duty of good faith and honesty in contractual performance and (iii) breach of confidence/breach of privacy, is disputed by the parties.

[45] Smiley argues (supported by Kakfwi) that she is not obliged to litigate her tort claim for sexual battery in this jurisdiction and the remaining claims in Quebec as this would be incompatible with the notion of fairness and efficiency. Consequently, this Court should assume jurisdiction of all aspects of her claim.

[46] Conversely, the Foundation argues that it is possible for a proceeding to comprise of claims in both contract and in tort. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant.

[47] Should such a connection exist in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. Here, despite the *locus* of the sexual battery being Newfoundland and Labrador, the remaining issues have a real and substantial connection to Quebec; specifically the MOAs that required Smiley and Kakfwi to attend the 2018 Summer Institute, and the subsequent investigation undertaken by the Foundation to address Smiley's allegations following the Incidents (see para. 99 of *Van Breda*).

A contract connected with the dispute was made in the province

[48] According to the evidence of Rosenberg, both the Smiley MOA and the Kakfwi MOA emphasize the commitment of both parties to the Foundation scholar-mentor relationship. This relationship is at the core of Smiley's claims against both defendants. This connection brought them together in 2018. The MOAs were signed when Smiley was residing in Montreal and Kakfwi was residing in Yellowknife.

[49] Where 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 *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, [2016] 1 SCR 851, at para. 40).

[50] Later in *Lapointe*, the Supreme Court addressed the degree of connection to a jurisdiction required. It noted the threshold "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" (see para. 44).

[51] I accept Rosenberg's evidence, and counsel for the Foundation's argument, that the last essential act in the formation of both MOAs was Rosenberg's signature on the document. Applying the *Van Breda* analysis to these facts, I find that the allegations by Smiley against the Foundation bring this proceeding within the scope of the MOA and the events that give rise to her claim.

Conclusion

[52] Smiley has established that the courts of Newfoundland and Labrador have jurisdiction *simpliciter* over the tort of sexual battery and the Foundation has established that the courts of Quebec have jurisdiction *simpliciter* over the remaining claims. The next step is for this Court to consider the Foundation's request to decline the exercise of its jurisdiction in favour of the Quebec courts through the *forum non-conveniens* analysis.

Sub-Issue No. 2.: *Forum non-conveniens.* Should there be a real and substantial connection to Quebec, then is Quebec the preferred and clearly most appropriate forum for Smiley's claims against both the Foundation and Kakfwi?

[53] The answer to this question is yes. In applying the principles of fairness and efficiency to the facts of this case, they point to Quebec as the "clearly more appropriate jurisdiction to hear Smiley's claims". The Foundation has met the required evidentiary and legal burden in this case.

RELEVANT LEGAL PRINCIPLES

[54] As noted above, the Supreme Court of Canada reformulated the approach to be applied for a *forum non conveniens* argument in *Van Breda* and its companion decision in *Breeden v. Black*, 2012 SCC 19 ("*Breeden*"), both of which stand as the leading authorities on the subject.

[55] In *Breeden* the Court wrote that the *forum non conveniens* analysis is about whether or not there is another forum that is clearly more appropriate; in other words, even if a court has jurisdiction (jurisdiction *simpliciter*), the analysis requires the court to consider whether or not it should exercise jurisdiction (see para. 23).

[56] At paragraph 30 in *Unifor*, Boone, J.A. set out the factors of **efficiency, fairness, and comity** as the considerations to be applied in the *forum non conveniens* test (as described at paragraphs 108 to 110 of *Van Breda*). They are to be considered and weighed in a single process.

Efficiency

[57] Regarding efficiency analysis, the Court in *Van Breda* noted that it would not be practical to set out an exhaustive list, but it did offer some guidance such as: (i) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum; (ii) the law to be applied to issues in the proceeding; (iii) the desirability of avoiding multiplicity of legal proceedings; (iv) the desirability of avoiding conflicting decisions in different courts; (v) the enforcement of an eventual judgment; and (vi) the fair and efficient working of the Canadian legal system as a whole (see paras. 105 and 110).

[58] Considerations by lower courts include: (i) geographical factors suggesting the natural forum (see *Re Clark Estate*, 2021 MBQB 23); and (ii) the location of key parties and witnesses (see *Smith v. Belanger*, 2009 ABQB 23).

Fairness

[59] As to the fairness analysis, the Court noted these are usually grouped together under the heading of juridical advantage. Overall they tend to favour the jurisdiction which will decide the substantial heart of the dispute using the fewest procedural and evidentiary barriers.

[60] In *Van Breda*, the Court held that any juridical advantage should be weighed with all of the other factors in deciding on *forum non conveniens*. Although juridical advantage factors are part of the balancing exercise, they ordinarily do not carry much weight because the juridical advantage for one party comes at the expense of juridical disadvantage for the other.

[61] Where a plaintiff demonstrates a legitimate juridical advantage in the chosen forum, this will weigh in favour of the plaintiff's choice, and not the defendant's. However, how much weight can be afforded to that choice is a function of the balancing exercise of juridical advantage and is very much a function of the parties' connection to the particular jurisdiction in question. This concept was discussed by the Supreme Court in *Amchem Products Inc. v. British Columbia* (*Workers' Compensation Board*), [1993] 1 S.C.R. 897 (see para. 32).

[62] Ultimately, the burden is on a party who seeks to depart from the normal state of affairs to establish it would be fairer and more efficient to deny the plaintiff's choice of forum.

Comity

[63] The parties agree that comity questions are not relevant to my analysis in this proceeding.

The "clearly more appropriate" analysis

[64] Paragraph 109 of *Van Breda* directs Courts to interpret the word "clearly" as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. A court should not exercise its discretion in favour of a stay solely because it finds that comparable forums exist in other provinces. Rather, the court hearing an application for a stay of proceedings **must find that a forum exists that is in a better position** to dispose fairly and efficiently of the litigation.

[65] In performing this exercise, it must be mindful that there is a rather low threshold under the conflicts rules (jurisdiction *simpliciter*). *Forum non conveniens* plays an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

[66] Later at paragraph 111, the court noted that the loss of juridical advantage is a difficulty that could arise once the action is stayed. In considering this question, a court must not quickly assume that the proper law naturally flows from the assumption of jurisdiction. Axiomatically, the governing law of the tort is not necessarily the domestic law of the forum. This may be so in many cases, but not always.

[67] Finally, at paragraph 112 the court spoke to whether it is legitimate to use the factor of loss of juridical advantage within the Canadian federation. Speaking to this issue, it held that extensive use in the *forum non conveniens* analysis might be inconsistent with the spirit and intent of its decisions. Citing its decisions in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and *Hunt v. T & N PLC*, [1993] 4 S.C.R. 289, the Court reaffirmed its strong attitude of respect for relations between the different provinces, courts and legal systems of Canada. It emphasized that differences in legal systems and jurisprudence should not be viewed as signs of disadvantage or inferiority.

POSITION OF THE PARTIES

The Foundation

[68] The position of the Foundation is straightforward; this Court must consider the proceeding as a whole and not through the narrow lens of one party and one issue. Should the Court adopt this perspective then the factual matrix underpinning this proceeding lines up with relevant jurisprudence and, accordingly, it should decline jurisdiction based on *forum non conveniens*.

[69] Regarding the choice of counsel factor, counsel for the Foundation argues that it should not form part of the Court's consideration because it does not constitute an "evidentiary or procedural barrier". There is no evidence before the Court that Ms. Smiley will be deprived of retaining a Quebec counsel with experience in indigenous sexual trauma should the Court decline jurisdiction.

Smiley

[70] Ms. Smiley's legal counsel argues the choice of counsel is a major fairness factor, which ought to be weight. In her view, the jurisprudence provided to the Court mostly examines *forum non-conveniens* in the context of competing common law jurisdictions. There is no jurisprudential analysis that examines the particular fact scenario before this Court.

[71] Ms. Marshall admitted that she is neither proficient in French or the *Quebec Civil Code*. She drew the Court's attention to the Barreau du Quebec's application for a Special Authorization to Practice under section 42.4 of their Professional Code. Section 42.4 states that the right of a party to obtain the assistance of an interpreter does not extend to a unilingual English speaking legal counsel, and that the Barreau reserves the right to require legal counsel applying for special authorization to be assisted by legal counsel who is a member of the Barreau.

[72] These particular hurdles make Ms. Smiley's situation unique as Ms. Marshall informed the Court that she would not be able to continue with the prosecution of her case should this Court decline jurisdiction in favour of Quebec. She went on to suggest that it will probably mean the end of Ms. Smiley's claim because it would force Ms. Smiley to retain new counsel in Quebec and lead to a re-traumatization of the sexual battery and the psychological and emotional distress she endured since the Incidents.

[73] As part of this aspect of her final argument, Ms. Marshall alluded that the process of having to retain new counsel could also revive Ms. Smiley's PTSD and

trauma from childhood sexual abuse. I find there was no evidence led on this last aspect and will not afford it any weight.

[74] According to Ms. Marshall, what is relevant is that the case requires a legal counsel that has expertise in prosecuting civil sexual violence/battery cases. She argues this criteria falls within her skill set because of her experience in prosecuting employment and institutional sexual assault cases. Later in her argument, Ms. Marshall conceded that there are likely lawyers in Quebec with similar skill sets as hers, but forcing Ms. Smiley to seek out such legal counsel would prejudice her case.

[75] On the financial side, Ms. Marshall points out that all of the work she has put into the file will have to be redone by new counsel. She argues this Court should examine the financial considerations such as the requirement that expert evidence on Quebec law will not be necessary; or, if required, then at most it would involve an affidavit and brief testimony from an expert in Quebec law. Moving the litigation to Quebec, however, would cause further delay and additional costs of a new legal counsel and expert expenses.

[76] Regarding the Foundation's argument that the Court must place weight on the choice of law clause to decline jurisdiction, Ms. Marshall asserts that the clause is not applicable to Ms. Smiley's case because the substance of her allegations are based in tort, not in contract, and the wording contained in the clause does not take into account actions framed in tort. Further, the Foundation's expert on Quebec law, Mr. Jean Pierre Sheppard, testified that under the *Quebec Civil Code* there is a cap on general damages for sexual battery of $300,000, and this cap is reserved for the most severe examples of sexual battery. Ms. Smiley has pleaded the amount of $500,000 in damages under this heading, so if this Court were to decline jurisdiction then Ms. Smiley would lose the juridical advantage of litigating this cause of action in Newfoundland and Labrador where there is no cap on general damages for sexual battery.

[77] Finally, refusing the transfer of the proceeding to Quebec would avoid the risk of multiple proceedings. Ms. Marshall pointed to the likelihood that given Mr. Kakfwi has filed a Defence and attorned to the jurisdiction, this will likely raise the

risk of him applying in Quebec to transfer the entire proceeding, or at least the sexual battery claim, back to Newfoundland and Labrador, thus leading to multiple proceedings and a highly inefficient waste of judicial resources.

Kakfwi

[78] Counsel for Kakfwi argues that the Foundation's position does not sufficiently recognize that the *locus* of the sexual battery is Newfoundland and Labrador, and that at the time of the Incidents it was conducting business here, thereby making it a "clearly appropriate" factor. He asserts that in *Haaretz.com* the Supreme Court cautioned against devaluing the *locus* of the tort as a presumptive connecting factor.

Applicable law and findings

[79] As noted by Boone, J.A. at paragraph 29 in *Unifor*, the Foundation has the burden to demonstrate that Quebec is clearly the more appropriate forum for disposing of this litigation, and thus ensuring fairness and a more efficient process for resolving this dispute.

[80] Smiley and Kakfwi rely on the caution issued by the Supreme Court at paragraph 37 of *Haaretz.com* that when engaging in the *forum non-conveniens* analysis, this Court should not devalue the importance of the *locus* of the tort. They argue that the Foundation is attempting to do so with its application.

[81] In reply, counsel for the Foundation pointed out the Court contextualized its caution by stating that it is preferable to address any concerns relating to the insufficiency of a presumptive connecting factor such as the *locus* of the tort, either at the rebuttal stage of the jurisdiction *simpliciter* analysis, or at the *forum non conveniens* stage.

[82] As I have arrived at the *forum non-conveniens* stage and the Foundation is challenging the sufficiency of the *locus* of the tort as a connecting factor, I must now engage the *Van Breda* analysis to determine whether I should decline jurisdiction to hear this matter, as the courts of Quebec are clearly the more appropriate forum.

[83] In making this determination, I must consider the factors of fairness and efficiency (see *Van Breda*, para. 109) in an objective manner and avoid the exercise of a "mechanical counting of contacts and connections" (see *Young v. Tyco International of Canada Ltd.*, 2008 ONCA 709, at para. 30). These factors are to be considered and weighed in a single process (see *Unifor*, at para. 30).

Efficiency Factors

The locations of parties and witnesses

[84] The affidavit and *viva voce* evidence supports four factual findings. First, that none of the parties or witnesses reside in Newfoundland and Labrador. Second, there is no evidence, including business records, based in Newfoundland and Labrador. Third, the only factual and legal connection to Newfoundland and Labrador is the Summer Institute and the alleged sexual battery that occurred in St. John's. Fourth, the remainder of Smiley's claims arise from her time in Quebec as a scholar.

[85] I accept the Foundation's argument that under this factor, Quebec is the more appropriate forum due to the fact it is the jurisdiction where the majority of relevant factual matters arose, including the choice of law clause and a Release, Discharge, and Indemnity provision contained in the MOA signed by Smiley.

[86] Smiley's Statement of Claim, besides the allegation of sexual battery, (see paras. 9-16), references three other major components. The first and second involve the breach of fiduciary duty and the breach of contract in the Foundation's vetting and Kakfwi's selection as a mentor. The third involves the breach of privacy and confidentiality arising from the Foundation's investigation following the alleged

sexual battery and the Executive Board's use of information obtained from the investigation in an email to Foundation members and scholars.

[87] Paragraph 11.11 of the MOA contains a choice of law clause that expressly provides that it "shall be governed by and interpreted and enforced in accordance with the laws of the Province of Quebec and the laws of Canada applicable therein".

[88] This factor supports declining jurisdiction in favour of Quebec.

The cost of transferring the case to another jurisdiction or of declining the stay

[89] Smiley's counsel argues that the Foundation has significant financial resources; however, they also come with significant restraints as defined by the terms of the $125 million endowment used to conserve its activities. Specifically, the Foundation is restricted to the use of the annual interest earned from its investments and operating costs, which are capped at 1.3 per cent of the funds' value.

[90] Given these restraints, the additional cost of conducting litigation outside of Quebec could seriously affect the Foundation's travel budget. This consideration would favour a transfer to Quebec where a majority of the witnesses reside. The location of Montreal would also substantially reduce travel costs to Smiley who resides in Vancouver and to Kakfwi who resides in Yellowknife.

[91] Currently, none of the parties or their potential witnesses reside within the jurisdiction of Newfoundland and Labrador. The proceeding is still in the infancy stage of litigation with the Foundation having filed its application for *forum non-conveniens* less than two months from the issuance of the Statement of Claim.

[92] Based on the evidence of Jean Pierre Sheppard, I find that the costs of reissuing the claim in Quebec would be minimal especially given that his affidavit and *viva voce* evidence identified all relevant provisions under the *Quebec Civil Code* that are comparable to the pleadings contained in Smiley's Statement of Claim. Should the proceeding remain in this jurisdiction then Smiley will be required to call expert evidence on the *Quebec Civil Code* and incur the expense of the fees and travel of such an expert.

[93] This factor supports declining jurisdiction in favour of Quebec.

The impact of a transfer on the conduct of the litigation or on related or parallel proceedings

[94] There are no parallel proceedings. Although Smiley did start a parallel proceeding in British Columbia by way of Notice of Civil Claim dated May 19, 2021, she discontinued the action by Notice of Discontinuance filed May 5, 2022.

[95] As for the current proceeding, the Foundation is not seeking a bifurcation of the sexual harassment component of Smiley's claim from the remainder of her action so it considers this factor not to be relevant to the Court's analysis.

[96] I would agree and consider this a neutral factor.

The possibility of conflicting judgments; problems related to the recognition and enforcement of judgments

[97] None of the parties advanced evidence or argument that this issue was relevant to the Court's analysis of *forum non conveniens*.

The relative strengths of the connections of the parties

[98] None of the parties has a substantial connection to Newfoundland and Labrador. The only connecting factor is that the parties were participants in a meeting held here in the summer of 2018.

Fairness Factors

[99] As noted by the Court in *Unifor* at paragraph 33, the fairness factors are usually grouped together under the heading of juridical advantage. These factors tend to favour the jurisdiction which will decide the substantial heart of the dispute filtered through the fewest procedural and evidentiary barriers. The list is not exhaustive.

[100] The Foundation argues that Ms. Smiley's choice of legal counsel argument should not be a consideration, as it does not constitute an evidentiary or procedural barrier. While I agree that it should not be a consideration under the efficiency factors, the argument can be considered under the fairness factors. The question though, is how much weight it should be given during the balancing exercise?

[101] In order to accomplish this task, I feel it is worthwhile to examine Smiley's evidence and her legal arguments.

Evidence of Ms. Smiley

[102] During the hearing, Ms. Smiley testified as to her unsuccessful efforts over a period of approximately two years to locate and retain counsel in the City of Montreal. She informed the Court that she was never able to get to the stage of a retainer but that she spoke with lawyers from eight firms who either did not want to

"go up against the Foundation" or knew the then current CEO, Ms. Fournier. Of the eight, she met with two in person.

[103] In addition, Ms. Smiley expressed mistrust regarding the Foundation. She provided the Court with the example that the Foundation allegedly took away a scholarship from a recipient who supported her issues with the Foundation during an online discussion forum among Foundation scholars.

[104] Finally, Ms. Smiley expressed the view that conducting her litigation in Montreal would also bring the disadvantage of being a litigant who is both English and indigenous. To this last point, however, Ms. Smiley did concede during cross-examination she recognized that judges swear an oath to be fair and impartial and that in Montreal there would likely be judges who would be clearly proficient in both English and French.

The choice of legal counsel argument

[105] There is no evidence placed before the Court that Ms. Smiley's legal counsel has applied and been denied a temporary licence for admission to the Barreau du Quebec. Counsel for the Foundation argues, and I agree, the Court is not being asked to deny Ms. Marshall as Ms. Smiley's counsel of choice. As noted by the Ontario Superior Court in *Judson v. Mitchele*, 2011 ONSC 6004, at paragraph 30 (a case supplied by Ms. Marshall), the right to retain counsel is not an absolute right and is subject to reasonable limitations (see *R. v. Spied* (1983), 43 O.R. (2d) 596, 3 D.L.R. (4th) 246 (Ont. C.A.), (at para. 5).

[106] Jurisprudence suggests I should not engage in speculative reasoning or conjecture when considering each of Ms. Smiley's arguments. If I were to do so as part of my *forum non-conveniens* analysis then this would amount to conjecture and speculation (see *Simmons v. Royal Newfoundland Constabulary Public Complaints Commission*, 2022 NLSC 27, at paras. 43-44).

[107] In *Rashidan v. National Dental Examining Board of Canada*, 2020 ONSC 4174, at paragraph 16, the court held that in conducting the *forum non conveniens* analysis a Court should not be influenced by the choice of counsel a party makes.

[108] Ms. Smiley testified that it is her wish to have her lawyer, Ms. Marshall, who practices in Ontario, act for her in this claim and that it would be impossible to find lawyers in Quebec with expertise in indigenous sexual trauma and employment law akin to Ms. Marshall and who she can trust to advance her claim against the Foundation.

[109] While I accept Ms. Smiley is entitled to retain the lawyer of her choice, that choice cannot govern the decision as to which forum is the most convenient to try the action. I find that it is more probable than not that Quebec has many excellent lawyers who are equally experienced in conducting litigation in the areas that Ms. Smiley seeks (see *Kahlon v. Cheecham*, 2010 ONSC 1957, at paras. 44-46).

The locus of the tort argument

[110] As noted previously, counsel for Ms. Smiley and Mr. Kakfwi argue the legal genesis of this proceeding is the pleading of sexual battery. The remainder of Ms. Smiley's allegations are merely legal offshoots that flow from the Incidents making the connection to Newfoundland and Labrador strong and the connection to Quebec weak.

[111] At paragraph 111 of *Van Breda* the *locus* of the tort is a presumptive factor for consideration under the "real and substantial connection" (jurisdiction *simpliciter*) analysis but may become less so under the "clearly more appropriate" (*forum non conveniens*) analysis. The principle behind the *forum non conveniens* analysis is identifying and weighing which factors clearly make one forum more appropriate to ensuring fairness to the parties and a more efficient process for resolving their dispute.

[112] I reject the argument of counsel for Ms. Smiley and Mr. Kakfwi that the connection to Newfoundland and Labrador is strong. Rather, I find that the evidence establishes it is a weak connection as both parties attended the Summer Institute because they were required to do so under their respective MOAs. Further, the MOAs are contracts that are governed under the laws of Quebec.

The loss of juridical advantage argument

[113] At paragraph 112 of *Van Breda*, the Court held that differences in civil procedure should not be viewed instinctively as signs of disadvantage or as in this case the ability to locate and retain an appropriate legal counsel in Quebec and have a fair and impartial adjudication before a Quebec court.

[114] In *Formula Contractors Ltd. v. Lafarge Canada Inc.*, 2009 BCSC 105, at paragraphs 16 to 19, the British Columbia Supreme Court declined to exercise jurisdiction over a proceeding on the basis that the circumstances disclosed that Alberta law governed the contract and it was the jurisdiction where the majority of the witnesses resided.

[115] The Court went on to note that in response to the choice of counsel argument advanced by Formula that it failed to produce evidence that it would be denied counsel of choice in Alberta due to the existence of national mobility agreements between provincial law societies or that its counsel of choice has unique or special expertise that is irreplaceable.

[116] The Court's reasoning in *Formula* aligns with the evidence adduced by the parties that none of the potentially key witnesses reside in Newfoundland and Labrador. The only aspect of Ms. Smiley's legal action that contains a link to the *locus* of Newfoundland and Labrador is her allegation of sexual battery.

[117] The Incidents could easily have occurred in another province or territory. There is no evidence before me that there are witnesses from this Province who may

have observed any of the interactions that occurred here. The juridical advantage of having the action conducted in Newfoundland and Labrador is outweighed by the Quebec courts' ability to apply the law of Newfoundland and Labrador to the sexual battery claim thereby avoiding the damages cap under the *Quebec Civil Code*.

The expense and inconvenience argument

[118] The issue of expense and inconvenience is equally present for all parties including the Foundation which is a charitable non-profit. I accept the evidence of Ms. Fournier that if the Foundation is required to come to Newfoundland and Labrador to defend the claim it will cause a serious constraint on its financial resources.

[119] I reject the arguments of Ms. Smiley and Mr. Kakfwi that there will be less overall expense if the litigation were to be conducted here because of little need for expert opinion on Quebec law. To the contrary, as argued by counsel for the Foundation, I find that if I decline jurisdiction then the only governing law that is required to adjudicate the sexual battery claim is the common law of Newfoundland and Labrador. Should the litigation proceed in Quebec then this means that the only expert evidence required for the proceeding would be in relation to Newfoundland and Labrador law regarding the tort of sexual battery.

[120] In either case, the successful party will be entitled to recover their expert witness and travel costs.

The Balancing Exercise

Factors favouring the jurisdiction of Newfoundland and Labrador

[121] When I review the efficiency factors, I do not find that any of the enumerated headings favour Newfoundland and Labrador, save perhaps, the connecting factor of the Incidents. I find this factor to be a tenuous connection from an efficiency perspective.

[122] However, when I apply the fairness factors, I find that while not specifically enumerated in *Van Breda*, the choice of counsel must be given some weight alongside the juridical advantages that come with the *locus* of the tort. When I weigh the choice of counsel factor, I find that there is no evidence to support Ms. Smiley's argument that declining jurisdiction in favour of Quebec would leave her unable to prosecute her claim. Similarly, when I weigh the factor of juridical advantage that comes with the *locus* of the tort, I find that this presumption is weak and does not defeat the other presumptive factors that favor Quebec.

Factors favouring the jurisdiction of Quebec

[123] Whereas when I review the efficiency factors for the Foundation, I find that the locations of parties and witnesses, along with the overall cost of transferring the case as opposed to declining the application for a stay, favour the jurisdiction of Quebec. The remaining factors are of neutral consequence.

[124] When I review the fairness factors, I find that if I were to decline jurisdiction in favour of Quebec it would not mean the end of Ms. Smiley's claim. It may lead to some additional costs and inefficiencies initially but the litigation is still in its early stages.

Conclusion

[125] I conclude that the evidence under the efficiency and fairness factors strongly establishes that Quebec is the jurisdiction which will decide the substantial heart of the dispute with the fewest procedural and evidentiary barriers. When these *forum non conveniens* factors are weighed and balanced, the Foundation has met its burden of establishing that Quebec is clearly the more appropriate forum to hear the action.

[126] This Court respects the jurisdiction of the Quebec courts to determine a resolution that is fair and equitable to all parties in a manner that would be considerably less inconvenient and expensive than were the parties to try the action in Newfoundland and Labrador.

[127] The Foundation's stay application is granted. Should a Quebec court refuse to hear the entirety of Ms. Smiley's claim then the parties have leave to apply to have the stay lifted. As for the issue of costs, I exercise my discretion not to award party and party costs on a Column III basis to the successful party; and, instead, grant leave to the parties to apply to be heard further on this issue.

PETER N. BROWNE
Justice