SCC File No. 33692 / 33606

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CLUB RESORTS LTD.

APPELLANT

– and –

MORGAN VAN BREDA, VICTOR BERG, JOAN VAN BREDA, TONY VAN BREDA, ADAM VAN BREDA and TONILLE VAN BREDA

RESPONDENTS

– and –

TOURISM INDUSTRY ASSOCIATION OF ONTARIO, CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNESTY INTERNATIONAL and ONTARIO TRIAL LAWYERS ASSOCIATION

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CLUB RESORTS LTD.

APPELLANT

– and –

ANNA CHARRON, ESTATE TRUSTEE OF THE ESTATE OF CLAUDE CHARRON, DECEASED, THE SAID ANNA CHARRON, PERSONALLY, et al.

RESPONDENTS

– and –

TOURISM INDUSTRY ASSOCIATION OF ONTARIO, CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, AMNESTY INTERNATIONAL and ONTARIO TRIAL LAWYERS ASSOCIATION

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PART I – OVERVIEW

1. The doctrine of forum of necessity operates as an additional and discretionary ground for asserting jurisdiction in tort proceedings relating to foreign defendants and extraterritorial events when none of the traditional bases apply (*i.e*. consent, presence or real and substantial connection). A court may exercise this jurisdiction where institution of proceedings elsewhere is impossible or could not reasonably be required, such as, for example, in civil claims for human rights violations like torture and genocide brought by plaintiffs who cannot return to the forum where the harm occurred without risking their lives or further injury.

2. The Court of Appeal for Ontario noted the emergence of the doctrine of forum of necessity in Canadian and European law as one of the justifications for reformulating the real and substantial connection test. The Court of Appeal for Ontario recognized that there can be exceptional cases where overriding considerations of fairness and the need to ensure access to justice will justify the assumption of jurisdiction in the absence of a real and substantial connection. These circumstances, the Court held, should be addressed under the forum of necessity doctrine rather than by distorting the real and substantial connection test.[1]

3. Amnesty International, the Canadian Centre for International Justice and Canadian Lawyers for International Human Rights ("the Joint International Human Rights Interveners") respectfully submit that the Court of Appeal for Ontario's explicit recognition of the forum of necessity doctrine is a positive development that harmonizes Ontario law with well-recognized national and international standards of jurisdiction and access to justice. This Honourable Court should affirm that important component of the decision on appeal.

4. Forum of necessity is rooted in the principles of order, fairness and comity. It promotes order and the rule of law by providing access to justice and a forum in which valid claims can be satisfactorily litigated. It also respects the requirements of fairness by preventing denials of justice to plaintiffs who have no other option but to sue in Canadian courts because of insurmountable or unreasonable impediments. Finally, when applied in exceptional cases relating to fundamental human rights protected by peremptory norms of international law (*jus cogens*), forum of necessity jurisdiction protects international comity.

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[1] *Van Breda v Village Resorts Ltd,* 2010 ONCA 84 at paras 54 and 100.

PART II – ISSUES

5. These appeals raise questions relating to the origins, objectives, and proper application of the forum of necessity doctrine. Indeed, the Appellant relies heavily on the doctrine in its submissions before this Honourable Court, whereas the Respondents argue that this Honourable Court need not decide if Ontario is a forum of necessity because they assert a real and substantial connection between their claims, the parties and Ontario.[2] It is therefore important that this Honourable Court have a full appreciation of the origins and operation of the forum of necessity doctrine prior to deciding what role, if any, it should have in the disposition of these appeals.

PART III – LAW AND ARGUMENT

6. These appeals concern the principles that govern the adjudicative jurisdiction of Canadian courts in tort proceedings involving foreign defendants and extraterritorial events. The Court of Appeal for Ontario held that it was appropriate to modify and clarify the principles it laid down in *Muscutt v Courcelles*[3] "*in light of the post-Muscutt changes to the legal landscape*",[4] including notably the emergence of the doctrine of forum of necessity.

7. The doctrine of forum of necessity provides a "*fourth basis of jurisdiction [...] beyond the traditional bases: consent, defendant's forum and real and substantial connection*",[5] the jurisdictional framework that this Honourable Court recognized in *Morguard*.[6] The Court of Appeal for Ontario held that the doctrine of forum of necessity "*allows the forum to take jurisdiction in cases despite the absence of a real and substantial connection where there is no other forum in which the plaintiff could reasonably seek relief.*"[7]

The Origins of the Forum of Necessity Doctrine

8. When *Muscutt v Courcelles* was heard in 2002, the law of Ontario recognized only "*three ways in which jurisdiction [could] be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction*."[8] But

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[2] Respondents' Factum in SCC File No. 33692 (Van Breda) at para 80.
[3] *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA).
[4] *Van Breda v Village Resorts Ltd,* 2010 ONCA 84 at para 70.
[5] Janet Walker, "*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48 *Can Bus L J* 135 at 136 [Emphasis in original].
[6] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at para 22 and 51.
[7] *Van Breda v Village Resorts Ltd,* 2010 ONCA 84 at para 54.
[8] *Muscutt v Courcelles* (2002), 60 OR (3d) 20 at para 19 (CA).

as Sharpe JA noted in the judgment on appeal, "*since Muscutt was decided, the concept of 'forum of necessity' or 'forum of last resort' has emerged as a significant jurisdictional doctrine*."[9]

9. Forum of necessity first appeared in Canada in 1991 with the enactment of Article 3136 of the *Quebec Civil Code*.[10] Following both Quebec's lead and the Uniform Law Conference of Canada's model *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*), British Columbia and Nova Scotia have since enacted forum of necessity provisions.

<table>
<tr><td>Quebec
Quebec Civil Code, SQ 1991, c 64, art 3136</td><td colspan="2">3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.</td><td>3136. Bien qu'une autorité québécoise ne soit pas compétente pour connaître d'un litige, elle peut, néanmoins, si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle y soit introduite, entendre le litige si celui-ci présente un lien suffisant avec le Québec.</td></tr>
<tr><td>Uniform Law Conference of Canada
Model Court Jurisdiction and Proceedings Transfer Act</td><td colspan="2">6. A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that:
(a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding; or
(b) the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required.
6.1. This section creates a residual discretion to act, notwithstanding the lack of jurisdiction under normal rules, provided that the conditions in (a) or (b) are met. Residual discretion permits the court to Act as a "forum of last resort" where there is no other forum in which the plaintiff could reasonably seek relief. The language tracks that of Article 3136 of the Quebec Civil Code.</td><td></td></tr>
<tr><td>British Columbia
CJPTA, SBC 2003, c 28, s 6</td><td colspan="3">6. A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that
(a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or
(b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required</td></tr>
</table>

[9] *Van Breda v Village Resorts Ltd,* 2010 ONCA 84 at para 54.
[10] *Civil Code of Quebec*, SQ 1991, c 64, article 3136; John McEvoy, "Forum of Necessity in Quebec Private International Law: CcQ art 3136" (2005) 35 *RGD* 61.

Nova Scotia *CJPTA*, SNS 2003, c 2, s 7	**7.** A court that under Section 4 lacks territorial competence in a proceeding may hear the proceeding notwithstanding that Section if it considers that (a) there is no court outside the Province in which the plaintiff can commence the proceeding; or (b) the commencement of the proceeding in a court outside the Province cannot reasonably be required.

10. The Court of Appeal for Ontario introduced a common law doctrine of forum of necessity in terms consistent with the legislated versions currently in force elsewhere in the country.[11] The judgment on appeal "*is the first case in Canada to recognize a common law forum of necessity doctrine*."[12]

11. As the official commentaries to the *Quebec Civil Code*[13] make clear, Article 3136 is directly modeled on Section 3 of Switzerland's *Loi fédérale du 18 décembre 1987 sur le droit international privé,* RS 291 ("Swiss Act"), which provides as follows:

3. When the present statute does not provide for a forum in Switzerland and when proceedings in another country are impossible or cannot be reasonably be required, the Swiss judicial or administrative authorities of the place with which the action has a sufficient connection shall have jurisdiction.[14]	3. Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes.[15]

12. In addition to Switzerland, necessity jurisdiction forms part of the law of France, Germany, Netherlands, Ireland and Portugal,[16] and "*is also found in article 6 of the European Convention on Human Rights.*"[17]

The Objective of Forum of Necessity Jurisdiction

13. The objective of forum of necessity jurisdiction is to provide plaintiffs with a forum in exceptional circumstances where it is impossible or unreasonable to expect them to commence

[11] *Van Breda v Village Resorts Ltd,* 2010 ONCA 84 at para 54 and 100.
[12] Tanya Monestier, "A 'Real and Substantial' Improvement? Van Breda Reformulates the Law of Jurisdiction in Ontario" in Hon. Justice Todd Archibald, Hon. Justice Randall Scott Echlin, *Annual Review of Civil Litigation* 2010, Toronto, Carswell, 2010 at 216. See also Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws,* 6th edition (looseleaf), volume 1 at 11-57.
[13] *Commentaires du ministre de la Justice*, volume 2, Publication du Québec, 1993 at 2000.
[14] *Swiss Federal Statute on Private International Law of December 18, 1987*, An English Translation by Jean-Claude Cornu, Stéphane Hankins and Symeon Symeonides, (1989) 37 *Am J Comp L* 193 at 196.
[15] *Loi fédérale du 18 décembre 1987 sur le droit international privé,* RS 291, article 3 (Suisse). The Swiss Act came into force on January 1st, 1989.
[16] John McEvoy, "Forum of Necessity in Quebec Private International Law: CcQ art 3136" (2005) 35 *RGD* 61 at 73.
[17] *Josephson (Litigation guardian of) v Balfour Recreation Commission*, 2010 BCSC 603 at para 86 ; Janet Walker, "*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48 *Can Bus L J* 135 at 136.

proceedings elsewhere. Forum of necessity jurisdiction ensures access to justice in cases where it would otherwise be denied.

14. During the drafting period of the Swiss Act, Professor Vischer, one of the act's principal authors, articulated the fundamental policy objective of the doctrine as follows:

> *A general forum of necessity in Switzerland is offered to foreigners when the absence of this forum has a totally inappropriate effect for the claimant, in the sense of an international denial of justice. The grant of this forum of necessity must be applied in a restrictive way, but its availability stems from the fact that there may always be situations not foreseen by the legislator making it absolutely imperative to provide access to our courts*.[18] [Emphasis added]

15. In a subsequent commentary on Section 3 of the Swiss Act, Professor Vischer emphasized that its main international legal function was to prevent denials of justice by providing access to national courts:

> *The negative conflict can lead to a "déni de justice" for the claimant, if he cannot obtain jurisdiction on the grounds that no State considers its courts competent. It is generally recognized that public international law demands that States should take the necessary precautions to provide respective jurisdiction or order to avoid denial of justice. The European Convention on Human Rights even confers on the prohibition of denial of justice the quality of being a human right (Art. 6§1).*[19]

16. Article 6(1) of the European Convention on Human Rights provides, *inter alia*, that in *"the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*."[20]

17. In European law, the Article 6(1) right of access to justice includes the right to access a court of law in which valid claims can be adjudicated. As the European Court of Human Rights stated in *Kreuz v Poland*, [2001] ECHR No. 28249/95 at para 52:

> *The Court reiterates that, [...] Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the "right to a court" [...]. The fair, public and expeditious characteristics of judicial proceedings are indeed of no value at all if such proceedings are not first initiated. And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts*. [Emphasis added]

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[18] Frank Vischer, "Drafting National Legislation on Conflict of Laws: The Swiss Experience" (1977) 41 *L & Contemp Prob* 131 at 136.
[19] Frank Vischer, "General Course on Private International Law" (1992) 232 *Recueil des cours* 9 at 204.
[20] *European Convention of Human Rights*, ETS No 5, 213 UNTS 221 (11 November 1950), Article 6.

18. The doctrine of forum of necessity protects the exercise of the fundamental right of every person to have their civil claims determined in a court of law.[21] This right is thwarted when victims of abuses like torture and genocide are unable to pursue justice in the courts of the country where the abuses happened.[22]

19. The right of every person "*to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations*"[23] is also a basic tenet of Canadian law.

20. With reference to the indispensable right to access courts of law in the context of litigation under the *Canadian Charter of Rights and Freedoms*, Dickson CJC stated:

> *To paraphrase the European Court of Human Rights in* Golder v. United Kingdom*, [...] it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the Charter and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. How can the courts independently maintain the rule of law [...] if court access is hindered, impeded or denied? The Charter protections would become merely illusory, the entire Charter undermined*.[24] [Emphasis added]

21. Likewise, the entire body of international human rights law, and particularly those conventional and customary norms to which Canada has assented such as the prohibitions against torture and genocide, would be made illusory if there were no court or tribunal available to apply that law. When its stringent conditions are met, the forum of necessity doctrine allows Canadian courts to act as a forum of last resort thereby avoiding a denial of justice.

Forum of Necessity Complies with Order, Fairness and Comity

22. The Respondents in *Van Breda* submit that this Honourable Court should not consider the doctrine of forum of necessity in this case because it has been suggested that the doctrine "*may be fragile from a constitutional point of view*".[25] The Joint International Human Rights Interveners submit, however, that since no constitutional challenge has been made in this case, this

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[21] *Universal Declaration on Human Rights*, UN GA res. 217A (III), UN Doc A/810 (10 December 1948), Articles 8 and 10; *International Covenant of Civil and Political Rights*, 999 UNTS 171 (16 December 1966), Article 14(1).
[22] François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings,* Toronto, Irwin Law, 2010 at 139-141.
[23] *Canadian Bill of Rights*, SC 1960, c 44, s 2(e). See also *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982 (UK)* being Schedule B to the *Canada Act 1982 (UK),* 1982, c 11, s 24(1).
[24] *BCGEU v British Columbia (AG)*, [1988] 2 SCR 214 at para 24.
[25] Respondents' Factum in SCC File No. 33692 (Van Breda) at para 81.

Honourable Court should proceed on the basis, as have other Canadian courts,[26] that the doctrine provides a legitimate basis for asserting jurisdiction.[27] It could result in an unintended chilling effect on the development of the doctrine for this Court to muse on the constitutionality of the provision in circumstances where it has not been put in issue.

23. In any event, the outer limits of a Canadian court's jurisdiction in international cases are not defined by the real and substantial connection test, but rather by the principles of order and fairness, which this Honourable Court has characterized as the "*constitutional imperatives*"[28] that underlie the Canadian approach to private international law. While international comity is not imbued with the same normative strength as order and fairness, it serves as "*a useful guiding principle when applying the rules of private international law*" in international cases.[29]

24. The Joint International Human Rights Interveners submit that forum of necessity complies with the requirements of order and fairness and protects international comity. The doctrine promotes order and the rule of law by providing access to justice and a forum in which valid claims can be satisfactorily litigated. Indeed, the judicial determination of legal disputes is an essential component of Canadian and international order. Forum of necessity also respects the requirements of fairness by preventing denials of justice to plaintiffs who have no other option but to sue in Canadian courts because of insurmountable or unreasonable impediments elsewhere.

25. The Court of Appeal for Ontario unanimously characterized the fairness of permitting access to justice as the "*overriding concern*"[30] of forum of necessity jurisdiction. While fairness is no longer considered as a stand-alone factor in the context of a real and substantial connection analysis, fairness is the definitive and prevailing factor when applying the forum of necessity doctrine. In other words, fairness is "*capable of trumping weak connections*" that would otherwise not justify the assumption of jurisdiction.[31]

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[26] E.g. *Josephson v Balfour Recreation Commission*, 2010 BCSC 603; *Olney v Rainville*, 2008 BCSC 753 at paras 38-40.
[27] In *Spar Aerospace Ltd v American Mobile Satellite Corp*, [2002] 4 SCR 205 at para 44, this Honourable Court refused to consider constitutional objections to a Quebec jurisdictional rule because no constitutional question was stated.
[28] *Hunt v T&N plc*, [1993] 4 SCR 289 at 324. See *Unifund Assurance Co v Insurance Corp of British Columbia*, [2003] 2 SCR 63 at paras 68-73 for an application of these constitutional imperatives.
[29] *Spar Aerospace Ltd v American Mobile Satellite Corp*, [2002] 4 SCR 205 at para 17.
[30] *Van Breda v Village Resorts Limited*, 2010 ONCA 84 at para 100.
[31] *Van Breda v Village Resorts Limited*, 2010 ONCA 84 at para 109.

26. In *Bouzari v Islamic Republic of Iran*, a civil claim for torture committed in Iran, which was brought after *Muscutt* but before the decision on appeal, the Court of Appeal for Ontario recognized the "*elevated*" function of fairness in cases where plaintiffs cannot turn to another forum. As Goudge JA noted: "*if Ontario does not take jurisdiction, the appellant will be left without a place to sue. Given that the appellant is now connected to Ontario by his citizenship, the requirement of fairness [...] would seem to be of elevated importance if the alternative is that the appellant cannot bring this action anywhere.*"[32] [Emphasis added]

27. Finally, when exercised in exceptional cases relating to fundamental human rights protected by peremptory norms of international law, the forum of necessity doctrine also protects international comity. In such cases, Canadian courts defend the interests of the international community as a whole by providing an impartial forum in which the highest-ranking norms of the international legal order are administered. The exercise of jurisdiction over claims that engage norms embodying the universal consensus of the international community, such as the prohibition of torture and genocide, "*will not significantly threaten the practical harmony that comity principles seek to protect*."[33]

28. In Canadian law, comity involves deference to "*the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws*."[34] However, as this Honourable Court has stated, "*deference ends where clear violations of international law and fundamental human rights begin*."[35] The exercise of jurisdiction on the basis of forum of necessity is therefore consistent with the proper boundaries of comity – deference is given to foreign courts that are open, fair and impartial, but a forum is provided to claimants who are legally or practically denied one elsewhere.

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[32] *Bouzari v Islamic Republic of Iran* (2004), 71 OR (3d) 675 at para 37 (CA).
[33] *Sosa v Alvarez-Machain,* 542 US 692 at 762 (per Breyer J, concurring).
[34] *Hilton v Guyot*, 159 US 113 at 164 (1895), as cited in *Spar Aerospace Ltd v American Mobile Satellite Corp*, [2002] 4 SCR 205 at para 19.
[35] *R v Hape,* [2007] 2 SCR 292 at para 52. See also François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings,* Toronto, Irwin Law, 2010 at 196-199.

Forum of Necessity Ensures Access to Justice for Survivors of Human Rights Abuses who are Legally or Practically Denied Access to a Foreign Court

29. These appeals do not require this Honourable Court to set exact limits on the forum of necessity doctrine's application. However, it is nevertheless possible to identify a range of cases in which jurisdiction might properly be asserted on the basis of forum of necessity. These include tort claims relating to egregious human rights violations instituted by plaintiffs who cannot return to the forum where the harm occurred without risking their lives or further injury.

30. In the judgment on appeal, the Court of Appeal for Ontario pointed to the doctrine of forum of necessity "*as a possible basis for jurisdiction"* in cases like *Bouzari v Islamic Republic of Iran*.[36] But as one scholar put it, "Bouzari *is, in a sense, the easy case; it involved egregious violations of international human rights where there was plainly no other forum to which the plaintiff could turn for redress*."[37] The Joint International Human Rights Interveners agree that cases like *Bouzari* meet the doctrine of forum of necessity's stringent standards of impossibility or unreasonableness.

31. The survivors of human rights violations for whom the Joint International Human Rights Interveners advocate are often unable to seek civil redress in the countries where the abuses occurred because they would be at risk of violence or death or because the judicial systems in those countries are often unable or unwilling to process their claims. In those exceptional situations, commencing proceedings in the place where the violations took place is either a practical impossibility or an unreasonable expectation to place upon the plaintiff, or both, and Canadian courts truly stand as the forum of last resort.

32. In *Lamborghini*, LeBel JA, as he then was, suggested that the forum of necessity provision of the *Quebec Civil Code* (Article 3136) would apply to situations where proceedings cannot be commenced in the natural forum due to perilous circumstances:

> *[L'article 3136] veut régler certains problèmes d'accès à la justice, pour un plaideur qui se trouve dans le territoire québécois, lorsque le forum étranger normalement compétent lui est inaccessible pour des raisons exceptionnelles, comme une impossibilité en droit ou une impossibilité pratique, presqu'absolue. Ainsi, on peut penser à celles résultant de la*

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[36] *Van Breda v Village Resorts Ltd,* 2010 ONCA 84 at para 54, referring to *Bouzari v Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 at para 36-38 (CA). See also Janet Walker, "*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48 *Can Bus L J* 135.

[37] Tanya Monestier, "A 'Real and Substantial' Improvement? Van Breda Reformulates the Law of Jurisdiction in Ontario" in Hon. Justice Todd Archibald, Hon. Justice Randall Scott Echlin, *Annual Review of Civil Litigation* 2010, Toronto, Carswell, 2010 at 216 [Emphasis added].

> *rupture des relations diplomatiques ou commerciales avec un État étranger ou de la nécessité de la protection d'un réfugié politique, ou à l'existence d'un danger physique sérieux, si l'on entame un débat devant le tribunal étranger.*[38] [Emphasis added]

33. While less perilous circumstances may also justify the assertion of jurisdiction on the basis of necessity,[39] the Joint International Human Rights Interveners respectfully submit that the doctrine clearly applies in cases where survivors of human rights violations cannot sue in the place the harm occurred without risk to life and limb.

34. Forum of necessity will not lead to an undue number of lawsuits in Canada about human rights abuses that occurred overseas. There already are mechanisms in place to reject any case not properly before the courts. Firstly, the claim must be actionable and justiciable at Canadian law. Moreover, some jurisdictions, like Quebec, require a "*sufficient connection*" to the province even under the forum of necessity doctrine. As well, the *State Immunity Act,* RSC 1985, c I-18 has been applied to dismiss *Bouzari* and other similar cases. Finally, the doctrine is discretionary in nature and thus the courts are entitled to consider all circumstances relevant to a given case in determining whether to exercise jurisdiction on basis of forum of necessity.

PART IV – SUBMISSIONS ON COSTS

35. The Joint International Human Rights Interveners are non-profit organizations. They do not seek costs on this appeal and request that no costs be ordered against them.

PART V – ORDER SOUGHT

36. The Joint International Human Rights Interveners submit that this appeal should be determined in a manner consistent with the foregoing principles. They respectfully request permission to present oral argument at the hearing on the legal issues.

All of which is respectfully submitted on this 7th day of March 2011.

François Larocque
Michael Sobkin
Mark C. Power

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[38] *Lamborghini (Canada) Inc c Automobili Lamborghini SPA,* [1996] JQ no 4175 at para 44 (CA). See *Josephson (Litigation guardian of) v Balfour Recreation Commission*, 2010 BCSC 603 at para 89 for an unofficial English translation of the salient passages of *Lamborghini*.

[39] See *Josephson (Litigation guardian of) v Balfour Recreation Commission*, 2010 BCSC 603 at para 80-102. In that case, the British Columbia Supreme Court concluded that it was a forum of necessity to hear a third party claim brought by the defendant, an Idaho resident, against other Idaho residents in circumstances where he could not bring the claim in Idaho yet would be liable under BC law for all of the damages suffered by the plaintiff, also an Idaho resident.

PART VI – TABLE OF AUTHORITIES

Tab	Document	Para cited
Caselaw		
1.	*BCGEU v British Columbia (AG)*, [1988] 2 SCR 214.	20
2.	*Bouzari v Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (CA).	26
	***Hunt v T&N plc*, [1993] 4 SCR 289.**	**23**
3.	*Josephson (Litigation guardian of) v. Balfour Recreation Commission*, 2010 BCSC 603.	22, 32, 33
4.	*Lamborghini (Canada) Inc c Automobili Lamborghini SPA,* [1996] JQ no 4175 (CA).	32
	***Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA).**	**6, 8**
5.	*Morguard Investments Ltd v De Savoye*, [1990] 3 RCS 1077.	
6.	*Olney v. Rainville*, 2008 BCSC 753.	7
7.	*R v Hape,* [2007] 2 SCR 292.	28
8.	*Sosa v Alvarez-Machain,* 542 US 692.	27
9.	*Spar Aerospace Ltd v American Mobile Satellite Corp*, [2002] 4 SCR 205.	22, 23, 28
10.	*Unifund Unifund Assurance Co v Insurance Corp of British Columbia*, [2003] 2 SCR 63.	23
11.	*Van Breda v Village Resorts Ltd,* 2010 ONCA 84.	2, 6, 7, 8, 10, 25, 30

PART VII – LEGISLATION

***Civil Code of Québec*, S.Q. 1991, c. 64**
3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

***Code civil du Québec*, L.Q. 1991**
3136. Bien qu'une autorité québécoise ne soit pas compétente pour connaître d'un litige, elle peut, néanmoins, si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle y soit introduite, entendre le litige si celui-ci présente un lien suffisant avec le Québec.

***Canadian Bill of Rights*, S.C. 1960, c. 44**

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(*g*) deprive a person of the right to the

***Déclaration canadienne des droits*, L.C. 1960, c. 44**

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

a) autorisant ou prononçant la détention, l'emprisonnement ou l'exil arbitraires de qui que ce soit;

b) infligeant des peines ou traitements cruels et inusités, ou comme en autorisant l'imposition;

c) privant une personne arrêtée ou détenue

(i) du droit d'être promptement informée des motifs de son arrestation ou de sa détention,

(ii) du droit de retenir et constituer un avocat sans délai, ou

(iii) du recours par voie d'*habeas corpus* pour qu'il soit jugé de la validité de sa détention et que sa libération soit ordonnée si la détention n'est pas légale;

d) autorisant une cour, un tribunal, une commission, un office, un conseil ou une autre autorité à contraindre une personne à témoigner si on lui refuse le secours d'un avocat, la protection contre son propre témoignage ou l'exercice de toute garantie d'ordre constitutionnel;

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

f) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa

assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable; ou

g) privant une personne du droit à l'assistance d'un interprète dans des procédures où elle est mise en cause ou est partie ou témoin, devant une cour, une commission, un office, un conseil ou autre tribunal, si elle ne comprend ou ne parle pas la langue dans laquelle se déroulent ces procédures.

***Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act*, 1982 (U.K.)) being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.**	***Charte canadienne des droits et libertés*, Partie 1 de *Loi constitutionnelle de 1982*** Édictée comme l'annexe B de la ***Loi de 1982 sur le Canada*,** 1982, (R.U.) ch. 11.
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances. (2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.