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You're It! Tag Jurisdiction over Corporations in Canada

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You're It! Tag Jurisdiction over Corporations in Canada

Tanya J. Monestier*

ABSTRACT

*In September 2015, the Supreme Court of Canada released its decision in *Chevron v. Yaiguaje*, a case that legal commentators had been keeping an eye on for years. The Chevron case has spanned several decades as well as several continents, and the enforcement action in Ontario was the latest in a series of procedural moves aimed at enforcing a nearly \$10 billion Ecuadorian judgment against the oil giant. In *Chevron*, the plaintiffs sought to have the judgment enforced in Ontario against both Chevron (the judgment debtor) and Chevron Canada (a seventh-level indirect subsidiary of the judgment debtor). The Chevron case did not decide the merits of the dispute, but rather addressed two discrete jurisdictional questions: (1) Was a real and substantial connection between Chevron and Ontario required in order to enforce a money judgment against Chevron? And, (2) What was the appropriate basis of jurisdiction over Chevron Canada?*

With respect to the first issue, the Court held that jurisdiction was properly assumed over Chevron, the judgment debtor, because service of process had been properly effected on Chevron pursuant to the Ontario Rules of Civil Procedure. No additional showing of a real and substantial connection between Chevron and Ontario was required. With respect to Chevron Canada, the Court held that jurisdiction was appropriate in Ontario because Chevron Canada was carrying on business in Ontario and it was served with process in juris. It is this latter holding that has the most potential to disrupt the existing case law.

*What the Supreme Court of Canada did in *Chevron* was essentially endorse tag jurisdiction over a corporation. If a corporation is carrying on business—a fairly low standard judging from the *Chevron* case itself—and the corporation is served in juris, then a provincial court will have general jurisdiction over the corporation. General jurisdiction, a largely American term, refers to the power of a court to adjudicate any and all disputes involving a defendant, even those with no connection to the underlying forum. Although the Court justified its holding on presence-based jurisdiction over Chevron Canada on the basis of well-established precedent, this Article takes the position that this precedent is actually not that well-established.*

For instance, in the leading case cited by the Supreme Court of Canada, Incorporated Broadcasters, the Ontario Court of Appeal actually appeared not to understand what is required to assert presence-based jurisdiction over a corporation. Additionally, this Article argues that there are various (likely unintended) conceptual problems created by the Supreme Court of Canada's decision in Chevron: the adoption of too low a standard for carrying on business, which results in the assertion of universal jurisdiction over corporate defendants; the partial subsuming of the real and substantial connection test; and the conceptual misalignment between presence-based jurisdiction and assumed jurisdiction. This latest development in Canada ironically comes at a time when U.S. courts are dramatically reining in general jurisdiction. This Article suggests that the United States' experience with this issue—and its reasons for severely limiting general jurisdiction—should inform Canadian jurisprudence on the topic.

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I. INTRODUCTION

In September 2015, the Supreme Court of Canada released the much-anticipated decision in *Chevron v. Yaiguaje*.¹ The case was subject to extensive national and international media coverage.² The Court in *Chevron* held that plaintiffs could proceed in their effort to enforce an Ecuadorian judgment for approximately \$9.5 billion (U.S.) against oil giant Chevron Corporation, as well as one of its indirect subsidiaries, Chevron Canada.³ The *Chevron* case is infamous⁴ in

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1. *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69 (Can.) [hereinafter *Chevron*].

2. See, e.g., Ian Austen & Clifford Krauss, *Court Says Chevron Can Be Pursued in Canada Over Ecuadorean Damage*, N.Y. TIMES (Sept. 4, 2015), http://www.nytimes.com/2015/09/05/business/international/court-says-chevron-can-be-pursued-in-canada-over-ecuadorean-damage.html?_r=0 [<https://perma.cc/F3TL-9QXG>] (archived Feb. 6, 2017); Nicole Hong & Kim Mackrael, *Canada's Top Court Rules in Favor of Ecuador Villagers in Chevron Case*, WALL ST. J. (Sept. 4, 2015), <http://www.wsj.com/articles/canadas-top-court-rules-in-favor-of-ecuador-villagers-in-chevron-case-1441384265> [<https://perma.cc/HR4S-MU5U>] (archived Feb. 6, 2017); Sean Fine, *Ecuadoreans can Sue Chevron in Canada, Supreme Court Rules*, GLOBE AND MAIL (Sept. 4, 2015), <http://www.theglobeandmail.com/news/national/ecuadoreans-can-sue-chevron-in-canada-supreme-court-rules/article-26225413/> [<https://perma.cc/7MPK-2AJ9>] (archived Feb. 6, 2017); Lisa A. Rickard, *Canada's Top Court Sets Dangerous Precedent in Chevron Case*, FIN. POST (Sept. 28, 2015), <http://business.financialpost.com/fp-comment/canadas-top-court-sets-dangerous-precedent-in-chevron-case> [<https://perma.cc/ACZ5-JUPL>] (archived Feb. 6, 2017); Cristin Schmitz, *SCC Sees Legal Pipeline Reaching from Ecuador to Here for Chevron*, LAWYERS WEEKLY (Sept. 25, 2015), <http://www.lawyersweekly.ca/articles/2517> [<https://perma.cc/QZS7-UVU2>] (archived Feb. 6, 2017).

3. *Chevron*, 3 S.C.R. at para. 96. In a subsequent opinion, the Ontario Superior Court of Justice granted the defendants' motion to dismiss the enforcement action against Chevron Canada, concluding that "the plaintiffs' claim cannot succeed against Chevron Canada." *Yaiguaje v. Chevron Corp.*, [2017] O.N.S.C 135, para. 74 (Can. Ont.). First, the court held that Chevron Canada's shares and assets were not exigible pursuant to the *Execution Act* to satisfy the judgment against Chevron. *Id.* at para. 34. In this respect, it stated:

The *Execution Act*, which is a procedural statute, does not create any rights in property but merely provides for the seizure and sale of property in which a judgment-debtor already has a right or interest. It does not establish a cause of action against Chevron Canada. Chevron Canada is not the judgment-debtor under the Ecuadorian judgment and, therefore, the *Execution Act* does not apply to it with respect to that judgment.

international litigation circles for its unique procedural posture and the vast sums of money involved. In the aftermath of the *Chevron* decision, newspaper reports and academic articles focused on the implications of the decision for the enforcement of judgments (particularly against an indirect subsidiary of the defendant) and for the law of corporate personality.⁴

The aspect of *Chevron* that no one has really focused on is what *Chevron* said about presence-based jurisdiction over corporations. The Supreme Court of Canada concluded that Ontario had jurisdiction *simpliciter* over Chevron Canada because Chevron Canada was properly served at a place where it carried on business in Ontario.⁵ The Court viewed this as a classic application of presence-based jurisdiction. It reiterated that presence-based jurisdiction was a “traditional” basis of jurisdiction, and that resorting to the real and substantial connection test was not necessary where a plaintiff relies on presence-based jurisdiction.⁶

What the Supreme Court of Canada has done in *Chevron* is to endorse “tag jurisdiction” for corporations.⁷ If a corporation can be

Id. at para. 37. Second, the court refused to pierce the corporate veil so as to allow the plaintiffs to use Chevron Canada’s assets to satisfy a potential judgment against Chevron. The court reasoned:

The plaintiffs do not allege that the corporate structure of which Chevron Canada is a part was designed or used as an instrument of fraud or wrongdoing. In fact, they specifically plead that they “do not allege any wrongdoing against Chevron Canada.” As such, they cannot establish wrongdoing akin to fraud in the corporate structure between Chevron and Chevron Canada. They, therefore, do not meet this fundamental condition of piercing Chevron Canada’s corporate veil.

Id. at para. 65. It is important to note that the Supreme Court’s pronouncements about jurisdiction over Chevron Canada are still good law notwithstanding that the action against Chevron Canada was ultimately dismissed on the merits.

4. See Jason MacLean, *Chevron Corp. v. Yaiguaje: Canadian Law and the New Global Economic and Environmental Realities*, 57 CAN. BUS. L. J. 367 (2016); Joel Reinhardt & Aweis Osman, *Chevron Corp. v. Yaiguaje: Expansion of Canada’s Generous and Liberal Approach in the Recognition and Enforcement of Foreign Judgments*, 45 ADVOC. Q. 339 (2016); Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344, 348–49 (2016); Sarah Whitmore & Vitali Berditchevski, *Jurisdiction to Enforce Foreign Judgments in Canada Clarified by Supreme Court of Canada*, 31 BANKING & FIN. L. REV. 411 (2016); Jason MacLean, *The Cult of Corporate Personality: Yaiguaje v. Chevron Corporation*, 55 CAN. BUS. L. J. 282 (2015).

5. *Chevron*, 3 S.C.R. at para. 94.

6. *Id.* at paras. 89–90, 94.

7. Tag jurisdiction is a term that is sometimes used to refer to presence-based jurisdiction over individuals. If an individual is served with process while physically present in the forum (i.e., he is tagged), then he is subject to personal jurisdiction there. In the United States, tag jurisdiction does not apply to corporations. See generally *Martinez v. Aero Caribbean*, 764 F.3d 1062 (9th Cir. 2014); Cody James Jacobs, *If Corporations Are People, Why Can’t They Play Tag?*, 46 N. M. L. REV. 1 (2015).

“tagged” with process in a province where it is carrying on business, then the corporation “is it,” meaning that the corporation will be subject to jurisdiction in that province for any and all claims, including those with no connection to the forum. This is a startling proposition. Consider the facts of *Chevron* itself: Chevron Canada’s head office was in Alberta and its registered office was in British Columbia. Its connection to Ontario was minimal. Thirteen of its seven hundred Canadian employees worked in Ontario, selling lubricant and chemical products. Three of these thirteen employees worked out of a physical office in Ontario.⁸ Stated differently, 0.004 percent of Chevron Canada’s workforce was present at the physical bricks-and-mortar location in Ontario, where Chevron Canada was served with process. And yet, this was sufficient for an Ontario court to assert jurisdiction over Chevron Canada with respect to a cause of action that had absolutely nothing to do with its activities in Ontario.

While presence-based jurisdiction over natural persons is well-established, there is little support in the case law for the proposition that service of process on a corporation that is carrying on business in the forum confers general jurisdiction over the corporation. The Court’s endorsement of presence-based (or tag) jurisdiction over corporations will certainly make it much easier for plaintiffs to ground jurisdiction over corporate defendants. But it is unclear whether the Court realized just how dramatic the implications of presence-based jurisdiction over corporations will be. This Article will discuss those implications and the (perhaps unintended) consequences of the *Chevron* holding with respect to presence-based jurisdiction.

This Article proceeds as follows: Part II discusses the *Chevron* decision, with particular focus on the Supreme Court of Canada’s pronouncement that presence-based jurisdiction was appropriately asserted over Chevron Canada because it had been served with process at its physical offices in Ontario. Part III deconstructs the *Chevron* decision and argues that presence-based jurisdiction is not supported by Canadian case law (or at least not the case law cited by the Court itself). Part IV focuses on the various conceptual problems created by *Chevron*: the adoption of too low a standard for carrying on business which results in the endorsement of universal jurisdiction over corporate defendants, the partial subsuming of the real and substantial connection test, and the *Chevron* test’s conceptual misalignment with *Van Breda*. Part V contrasts the developments in Canada with those in the United States and argues that, just as U.S. courts are dramatically reining in general jurisdiction (by eliminating “doing business” jurisdiction), Canadian courts are dramatically

8. Factum of the Appellant Chevron Can. Ltd., *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69 (Can.) (No. 35682), para. 12. This presence in Ontario started in May 2012, the same month as the enforcement proceedings were commenced in Ontario, but decades after all the events occurred and the underlying lawsuits were filed.

expanding general jurisdiction. Part V also examines the policy reasons behind the shift in the American case law and argues that they are equally applicable to Canada. Part VI offers some concluding remarks.

II. THE *CHEVRON* DECISION

In *Chevron*, the plaintiffs sought to recognize and enforce in Ontario a \$9.5 billion (U.S.) judgment against both Chevron and Chevron Canada.⁹ The enforcement proceedings in Ontario were part of a decades-long battle between oil giant Chevron and a class of Ecuadorian plaintiffs who advanced a variety of claims related to Chevron's oil extraction activities in Ecuador dating back to the 1960s.¹⁰ The case was originally brought in federal court in New York. After years of litigation, the New York court dismissed the case on the basis of *forum non conveniens*.¹¹ The Ecuadorian plaintiffs refiled their suit in Ecuador, ultimately winning a judgment of nearly \$17.2 billion. This figure was reduced to \$9.51 billion on appeal.¹²

The plaintiffs attempted to enforce the Ecuadorian judgment in U.S. courts to no avail.¹³ The plaintiffs also sought to have the judgment recognized and enforced in Ontario. To that end, the plaintiffs sued both Chevron (the judgment debtor) and Chevron Canada, a seventh-level indirect subsidiary of Chevron. Chevron was served at its head office in California. Chevron Canada was served both at its extra-provincially registered office in British Columbia and at its place of business in Ontario. Both Chevron and Chevron Canada sought orders setting aside service *ex juris* of the amended statement of claim, arguing that the court had no jurisdiction to hear the action.¹⁴

The motion judge ruled in the plaintiffs' favor with respect to jurisdiction, holding that Ontario did have jurisdiction over the action. However, he exercised the court's power to stay the proceeding under section 106 of the Ontario Courts of Justice Act.¹⁵ The Ontario Court

9. *Chevron*, 3 S.C.R. at paras. 6, 70–75. The description here is necessarily abbreviated, as the underlying litigation does not have a bearing on the jurisdictional issue discussed in this Article.

10. The claims were actually against Chevron's predecessor, Texaco, and its subsidiary.

11. *Chevron v. Donziger*, 768 F. Supp. 2d 581, 594 (S.D.N.Y. 2011) [hereinafter *Donziger*].

12. *See Chevron*, 3 S.C.R. at para. 6.

13. *See Donziger*, 768 F. Supp. 2d at 626–27, 660.

14. *Chevron*, 3 S.C.R. at para. 14.

15. *Id.* at para. 15. The Supreme Court described the motion judge's reasons for ordering a stay as follows:

First, Chevron does not own, has never owned, and has no intention of owning assets in Ontario. Second, Chevron conducts no business in Ontario. Third, there is no basis for asserting that Chevron Canada's assets are Chevron's assets for

of Appeal disagreed with the motion judge's ruling, holding that this was not an appropriate case in which to impose a stay.¹⁶ On the jurisdictional issue with respect to Chevron, the Court of Appeal held that Ontario had jurisdiction over the action. There was no requirement for there to be a real and substantial connection between Ontario and the judgment debtor, Chevron;¹⁷ the only requirement was that there was a real and substantial connection between the judgment court (Ecuador) and the defendant or the subject matter of the dispute.¹⁸ With respect to Chevron Canada, the Court of Appeal found that, in light of its bricks-and-mortar business in Ontario and its significant relationship with Chevron, an Ontario court had jurisdiction to adjudicate a recognition and enforcement action against it.¹⁹

Thus, there were two jurisdictional questions that the Supreme Court of Canada was called upon to resolve in *Chevron*. First, in an action to recognize and enforce a foreign judgment, did there need to be a real and substantial connection between the judgment debtor, Chevron, and the forum? Or, was it sufficient for jurisdictional purposes that Chevron had exigible assets in Ontario? Second, how is jurisdiction to be assessed over a non-party to the original action (Chevron Canada)?

With respect to the first issue, the Supreme Court of Canada held that jurisdiction over Chevron was established by virtue of service *ex juris* under Rule 17.02(m).²⁰ Rule 17.02(m) provides that "[a] party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims . . . on a judgment of a court outside Ontario."²¹ According to the Court, in actions to recognize and enforce a foreign judgment, "it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant."²² The Court clarified that, with respect to enforcement actions, the additional hurdle of establishing a

the purposes of satisfying the Ecuadorian judgment. Chevron does not own Chevron Canada's shares. Nor is there a legal basis for piercing Chevron Canada's corporate veil. In the judge's view, even though "[i]mportant considerations of international comity accompany any request for the recognition of a judgment rendered by a foreign court . . . , [t]he evidence [in this case] disclosed that there is nothing in Ontario to fight over", and thus no reason to allow the claim to proceed any further.

Id.

16. *Id.* at para. 18.

17. *Id.* at para. 20.

18. *Id.* at paras. 20–21.

19. *Id.* at para. 22.

20. *Id.* at para. 76.

21. Rules of Civil Procedure, R.S.O. 1990, Reg. 194, 17.02(m) (Can.).

22. *Chevron*, 3 S.C.R. at para. 27.

real and substantial connection between the judgment debtor and the forum was not necessary. The only jurisdictional prerequisite is that the foreign court issuing the judgment had to have a real and substantial connection with either the defendant or the subject matter of the dispute.²³ The Court justified this conclusion on four bases:

First, this Court has rightly never imposed a requirement to prove a real and substantial connection between the defendant or the dispute and the province in actions to recognize and enforce foreign judgments. Second, the distinct principles that underlie actions for recognition and enforcement as opposed to actions at first instance support this position. Third, the experiences of other jurisdictions, convincing academic commentary, and the fact that comparable statutory provisions exist in provincial legislation reinforce this approach. Finally, practical considerations militate against adopting Chevron's submission [that a real and substantial connection between Chevron and Ontario is required].²⁴

The Court further noted that there is a "crucial difference" between an action at first instance and one seeking recognition and enforcement of a foreign judgment in that "the only purpose of the [latter] is to allow a pre-existing obligation to be fulfilled."²⁵ The Court emphasized that, in recognition actions, "the enforcing court's role is not one of substance, but [] instead one of facilitation."²⁶ Accordingly, the Court held that the Ontario court had jurisdiction over the judgment debtor because Chevron was properly served on the basis of a foreign judgment; no additional showing of a real and substantial connection between Chevron and Ontario was necessary.²⁷

The litigation, however, also involved Chevron Canada: the plaintiffs argued that the assets of Chevron's subsidiary, Chevron Canada, should be used to satisfy the judgment against Chevron. Thus, the Supreme Court of Canada had to consider on what basis Ontario could assume jurisdiction over Chevron Canada. Clearly, Rule 17.02(m) (service out of Ontario on the basis of a foreign judgment) could not be used to establish jurisdiction, since Chevron Canada was

23. *Id.*

24. *Id.*

25. *Id.* at para. 42.

26. *Id.* at para. 44. *See also id.* at para. 48 ("No concern about the legitimacy of the exercise of state power exists in actions to recognize and enforce foreign judgments against judgment debtors. As I have explained, when such an action comes before a Canadian court, the court is not assuming jurisdiction over the parties in the same way as would occur in a first instance case. The enforcing court has no interest in adjudicating the original rights of the parties. Rather, the court merely seeks to assist in the enforcement of what has already been decided in another forum. As Deschamps J. aptly stated in *Pro Swing*, "[t]he enforcing court . . . lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms[.]" The manner in which the court exercises control over the parties is thus different—and far less invasive—than in an action at first instance.") (internal citations omitted).

27. *See id.* at paras. 87, 89.

not a party to the original Ecuadorian action. The Court ultimately held that Ontario had jurisdiction over Chevron Canada because Chevron Canada was properly served *in juris* under Rule 16.²⁸ According to the Court, because jurisdiction was premised on Chevron Canada's presence in Ontario, there was no need to resort to the real and substantial connection test to establish jurisdiction.²⁹

The Court confirmed that the traditional grounds for jurisdiction—presence and consent—continued to apply irrespective of the real and substantial connection test.³⁰ It noted that “*Van Breda* specifically preserved the traditional jurisdictional grounds of presence and consent.”³¹ The Court further elaborated that,

[w]hile *Van Breda* simplified, justified, and explained many critical aspects of Canadian private international law, it did not purport to displace the traditional jurisdictional grounds. LeBel J. explicitly stated that, in addition to the connecting factors he established for assumed jurisdiction, “jurisdiction may also be based on traditional grounds, like the defendant’s presence in the jurisdiction or consent to submit to the court’s jurisdiction, if they are established[.]” In other words, “[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.”³²

The Court referenced the longstanding history of the presence rule, stating that “its historical roots ‘cannot be over-emphasized.’”³³ It then provided a statement of the presence rule and explained how the rule differs from jurisdiction based on the real and substantial connection test:

[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 (service *in juris*). If service is properly effected on a person who is in the forum at the time of the action, the court has jurisdiction regardless of the nature of the cause of action. Assumed jurisdiction, for its part, emerged much later and developed through the adoption of rules for service *ex juris*. When a court finds that it has jurisdiction on this basis, that jurisdiction is limited to the specific action at issue before it.³⁴

28. See *id.* at para. 94.

29. *Id.* at para. 89.

30. Chevron Canada had tried arguing that the real and substantial connection test was applicable and that it rebutted the presumption of jurisdiction that arises from carrying on business. The Court explained “[i]n Chevron Canada’s view, carrying on business from an office is only a presumptive connecting factor that can be rebutted by showing that there is no connection between the claim and the business the corporation conducts in the province.” *Id.* at para. 79.

31. *Id.* at para. 81.

32. *Id.* at para. 84 (citations omitted).

33. *Id.* at 83 (quoting Stephen G. A. Pitel & Cheryl D. Dusten, *Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada’s New Approach to Jurisdiction*, 85 CAN. BAR REV. 61, 69 (2006)).

34. *Chevron*, 3 S.C.R. at para. 83 (citations omitted).

The Court noted that to actually establish presence-based jurisdiction, a corporate defendant must be “carrying on business in the forum at the time of the action.”³⁵ The inquiry into whether a corporation is carrying on business is necessarily a fact intensive one.³⁶ It observed that the “maintenance of physical business premises” is a compelling indicator of business presence.³⁷ The Court also expressed support for the proposition that the “degree of business activity [be] sustained for a period of time.”³⁸

The Court then purported to apply the presence-based jurisdiction rule to Chevron Canada. It repeated the motion judge’s findings with respect to Chevron Canada’s business presence in Ontario:

Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere ‘virtual’ business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province.³⁹

Given that these findings had not been contested, the Court concluded that these factual connections to Ontario were sufficient to establish presence-based jurisdiction over Chevron Canada.⁴⁰ In the Court’s words,

Chevron Canada has a physical office in Mississauga, Ontario, where it was served pursuant to rule 16.02(1)(c), which provides that valid service can be made at a place of business in Ontario. Chevron Canada’s business activities at this office are sustained; it has representatives who provide services to customers in the province.⁴¹

The Court further observed that “Canadian courts have found that jurisdiction exists in such circumstances,” citing a variety of cases.⁴²

35. *Id.* at para. 85.

36. *Id.* Whether a corporation is “carrying on business” in the province is a question of fact. *See Wilson v. Hull* (1995), 174 A.R. 81 (C.A.), at para. 52; *Ingersoll Packing Co. v. New York Central & Hudson River R.R. Co.* (1918), 42 O.L.R. 330, 337 (S.C. App. Div.).

37. *Id.* at para. 85. The Court noted “LeBel J. accepted this in *Van Breda* when he held that ‘carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there.’” *Id.*

38. *Id.* (citations omitted). In *Wilson*, the Alberta Court of Appeal was asked to assess whether a company was carrying on business in the jurisdiction in the context of statutory registration of a foreign judgment. It held that to make this determination, the court must inquire 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.” *Id.* (quoting *Wilson*, 174 A.R. at para. 13).

39. *Id.* at para. 86 (quoting motion judge’s factual findings concerning Chevron Canada’s Mississauga office).

40. *Id.*

41. *Id.*

42. *Id.* (citing *Incorporated Broadcasters Ltd. v. Canwest Global Comm. Corp.* (2003), 63 O.R. 3d 431, para. 36 (Can. Ont. C.A.); *Prince v. ACE Aviation Holdings and*

The Court then determined that its holding on presence-based jurisdiction concluded the inquiry.⁴³ No further resort to the real and substantial connection test was warranted. In this respect, the Court stated that

[t]he motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction. As several lower courts have noted both prior to and since *Van Breda*, where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists In other words, the question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction in this case.⁴⁴

Nonetheless, since Chevron Canada had "add[ed] constitutional flavour to its submissions," the Court went further and explained why the constitutional principle of real and substantial connection⁴⁵ did not mandate a different result in this case. In *Van Breda*, the Court emphasized that the real and substantial connection test, as a constitutional rule, ensured that the assertion of jurisdiction over a defendant would be legitimate.⁴⁶ The Court then stated that the real and substantial connection test as a constitutional principle does not mean that it is "illegitimate" to assert jurisdiction over Chevron Canada.⁴⁷ It continued:

Chevron Canada has elected to establish and continue to operate a place of business in Mississauga, Ontario, at which it was served. It should therefore have expected that it might one day be called upon to answer to an Ontario court's request that it defend against an action. If a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved.⁴⁸

Air Canada (2013), 115 O.R. 3d 721, para. 14 (Can. Ont. Sup. Ct. J.), appeal dismissed and cross-appeal allowed (2014) 120 O.R. 3d 140 (Can. Ont. C.A.); *Abdula v. Canadian Solar Inc.* (2011), 92 B.L.R. 4th 324 (Can. Ont. Sup. Ct. J.), *aff'd*, (2012), 110 O.R. 3d 256 (Can. Ont. C.A.); *Wilson v. Hull* (1995), 174 A.R. 81 (Can. Alta. C.A.); *Charron v. Banque provinciale du Canada*, [1936] O.W.N. 315 (Can. Ont. H.C.J.).

43. *See id.* at para. 87.

44. *Id.* (citations omitted).

45. *Id.* at para. 88. As distinct from the real and substantial connection articulated as a conflict of laws rule in *Van Breda*. *See Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572, paras. 42–50 (Can.) [hereinafter *Van Breda*].

46. *Chevron*, 3 S.C.R. at para. 89. The *Chevron* court explained:

As noted in my discussion of *Chevron*, LeBel J. articulated this constitutional principle as suggesting that "the connection between a state and a dispute cannot be weak or hypothetical", as such a connection "would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute."

Id. at para. 88.

47. *Id.* at para. 89 (emphasis in original).

48. *Id.*

The Court then reiterated its original conclusion that Ontario courts had presence-based jurisdiction over Chevron Canada and that the real and substantial connection test articulated in *Van Breda* was not applicable.⁴⁹ To resort to *Van Breda* in this context “would be to permit a total conflation of presence-based and assumed jurisdiction.”⁵⁰

III. DECONSTRUCTING *CHEVRON*

This Article focuses on the second issue that the Supreme Court of Canada addressed in *Chevron*: the use of presence as a basis for jurisdiction over a corporation.⁵¹ It is critical to note that, even though the Court’s discussion of presence-based jurisdiction took place in the context of an enforcement proceeding, its holding applies with equal force to an action at first instance.⁵² Accordingly, the *Chevron* case must be read to stand for the proposition that if a corporation is carrying on business and is served with process in a particular province, then that province can assume jurisdiction over the corporation. That jurisdiction is, to use the American terminology, general jurisdiction—jurisdiction in respect of any and all claims against the corporation, not simply those claims that arise from or relate to the defendant’s contacts with the forum.⁵³ Although

49. *Id.*

50. *Id.*

51. It is not clear whether, or how, these principles are to apply to other business entities (e.g., partnerships, associations, cooperatives, and sole proprietorships).

52. See *id.* at paras. 24, 27. See also Tanya J. Monestier, *Jurisdiction and the Enforcement of Foreign Judgments*, 42 *ADVOC. Q.* 107, 110–11 (2013):

Even though the real and substantial connection test originated in the judgment enforcement context, it also became the touchstone for jurisdiction over *ex juris* defendants in general. In other words, the real and substantial connection test that was developed to expand the potential grounds of jurisdiction for enforcement purposes soon became the litmus test for “regular” jurisdictional analysis as well. The complementarity of the jurisdictional test was telegraphed in *Morguard* itself when Justice La Forest stated that “the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives.” Given the correlative nature of the jurisdictional test (i.e., the idea that judicial jurisdiction is the same on the “front end” as on the “back end”), it became increasingly important for courts to be mindful of how developments in the law of jurisdiction on the front end would impact the law of jurisdiction on the back end and vice versa.

(citations omitted).

53. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 *HARV. L. REV.* 1121, 1136 (1966):

In American thinking, affiliations between the forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate. This we call specific jurisdiction. On the other hand,

commentators have focused on various aspects of the *Chevron* decision (including its implications for the enforcement of judgments and for the doctrine of separate corporate personality), it is arguably the Court's explicit endorsement of presence-based jurisdiction over corporations that has the greatest potential to wreak havoc in the case law.

A close examination of the Court's judgment in *Chevron* reveals that authority for the proposition that courts can exercise presence-based jurisdiction over a corporation is decidedly absent. The Court essentially offers two sources of support for presence-based jurisdiction: "historical roots" and case law.⁵⁴ The Court in *Chevron* emphasizes repeatedly that presence is a "traditional" basis of jurisdiction.⁵⁵ It cites an article by Stephen Pitel and Cheryl Dusten to the effect that presence-based jurisdiction has been around for decades and that its historical lineage "cannot be over-emphasized."⁵⁶ Nowhere in the judgment, however, does it actually explain what that historical lineage is *as applied to corporations*.

It is true that presence-based jurisdiction is a well-established and traditional form of jurisdiction for natural persons. Thus, when a person is served with process while in the forum, the court is said to have personal jurisdiction over him.⁵⁷ In fact, the Supreme Court of Canada cites one of my own previous articles for this proposition: "[i]f service is properly effected on a person who is in the forum at the time of the action, the court has jurisdiction regardless of the nature of the cause of action."⁵⁸ Notably, I used the word *person*—meaning natural person—when referring to presence-based jurisdiction. The rule that natural persons are subject to personal jurisdiction if they are served with process while in the forum certainly has its critics,⁵⁹ but it is an accepted and internationally-recognized form of jurisdiction.⁶⁰

American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.

54. See *Chevron*, 3 S.C.R. at para. 83.

55. *Id.* at paras. 3, 27, 29, 30, 79, 82, 83, 84, 85, 86, 88, 90, 91, 95.

56. *Id.* at para. 83 (emphasis in original) (citing Pitel & Dusten, *supra* note 33, at 69).

57. See *Maharane Seethadevi Gaekwar of Baroda v. Wildenstein* [1972] 2 Q.B. 283 at 289–90 (Eng.); *Burnham v. Superior Ct. of Cal., Cty. of Marin*, 495 U.S. 604, 619 (1990).

58. See Tanya J. Monestier, (Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada, 36 *FORDHAM INT'L L.J.* 396, 449 (2013).

59. See, e.g., Jeffrey W. Stempel, *The Irrepressible Myth of Burnham and Its Increasing Indefensibility After Goodyear and Daimler*, 15 *NEV. L. J.* 1203, 1233 (2015); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 *STAN. J. INT'L L.* 301, 331–32 (2008).

60. See, e.g., *Burnham*, 496 U.S. at 619.

The same cannot be said for presence-based jurisdiction over corporations. There is very little support in the Canadian case law for the proposition that service of process on a corporation that is carrying on business in the forum confers jurisdiction over the corporation. The Supreme Court cites five cases in support of its conclusion that presence-based jurisdiction applies to corporations: *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*,⁶¹ *Prince v. ACE Aviation Holdings Inc.*,⁶² *Abdula v. Canadian Solar Inc.*,⁶³ *Wilson v. Hull*,⁶⁴ and *Charron v. Banque provinciale du Canada*.⁶⁵ None of these cases, however, stands for the proposition that courts can exercise presence-based jurisdiction over a corporation.

A. Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.

In *Incorporated Broadcasters*—the first case cited by the Supreme Court of Canada—the Ontario Court of Appeal did purport to apply its understanding of presence-based jurisdiction to various corporate defendants. From an analysis of the case, however, it appears that the Court of Appeal did not fully understand or appreciate what was meant by presence-based jurisdiction. The Court of Appeal cited *Muscutt v. Courcelles*⁶⁶ for the proposition that there are three different ways to establish personal jurisdiction over a defendant: (1) presence-based jurisdiction, (2) consent-based jurisdiction, and (3) assumed jurisdiction. The Court of Appeal noted that “[p]resence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court.”⁶⁷ The quoted passage from *Muscutt* is inaccurate. It is not that “[p]resence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court”; it is that “[p]resence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court” *when served with process*.⁶⁸ This latter qualifier is critical. A person is not subject to presence-based jurisdiction simply because he is *in* the forum—it is the act of serving process on that person, while he is in the forum, that confers presence-based jurisdiction. If a person from Ontario, for instance, travels to Manitoba and gets into a car accident there, he is not automatically subject to the

61. *Incorporated Broadcasters*, 63 O.R. 3d at para. 36.

62. *Prince*, 115 O.R. 3d at para. 14.

63. *Abdula*, 92 B.L.R. 4th at 324.

64. *Wilson*, 174 A.R. 81 at para. 13.

65. *Charron*, O.W.N. 315.

66. *Muscutt et al. v. Courcelles et al.* (2002), 60 O.R. 3d 20 at para. 19.

67. *Incorporated Broadcasters*, 63 O.R. 3d at para. 29.

68. *Id.* (quoting *Muscutt*, 60 O.R. 3d at para. 19).

jurisdiction of the Manitoba courts because he is physically present there. Only if he is served with process while he is in the province will Manitoba courts have personal jurisdiction over him based on presence.⁶⁹

The Ontario Court of Appeal in *Incorporated Broadcasters* articulated the rule with respect to presence-based jurisdiction two more times without the important qualifier regarding service of process: “[w]here the defendant is within the jurisdiction, the court has jurisdiction over the person”;⁷⁰ and “[t]here is no constitutional impediment to a court asserting jurisdiction over a person having a presence in the province.”⁷¹ The Court of Appeal then stated that “with the exception of Mr. Asper, all of the defendants have a presence in Ontario that makes them subject to the jurisdiction of the Ontario courts.”⁷² Notably, the Court of Appeal claimed that the defendants had “a presence in Ontario,” not that the defendants had a presence in Ontario *and* that they were served with process in Ontario. The Court of Appeal explained the nature of the presence for each of the four corporate defendants:

CanWest Global is a federally incorporated corporation with its registered office in Winnipeg. However, it carries on business in Ontario in television, newspapers, and radio, specialty cable channels and Internet websites. By choosing to carry on business in Ontario, CanWest Global is subject to the jurisdiction of Ontario courts. The defendants Global Television and Global Communications Limited are federally incorporated corporations with registered offices in Ontario carrying on business in Ontario. By virtue of their place of registered office and where they carry on business they are resident in Ontario and therefore subject to the jurisdiction of the Ontario courts. The defendant CanVideo Television Sales (1983) Limited was originally an Ontario corporation and is now a federally incorporated corporation and carries on business from offices in Toronto and is subject to the jurisdiction of the Ontario courts. The defendant CanWest Global Broadcasting Inc. is a federal corporation with its registered office in Quebec but with offices in Toronto. It too is subject to the jurisdiction of Ontario courts.⁷³

The Ontario Court of Appeal carefully pointed out that the various defendants were carrying on business in Ontario—but nowhere did the court say that each of these corporate defendants was served with process at their Ontario business establishment (as opposed to, say, at their extra-provincial head office).⁷⁴ In fact, its statements suggest that the very fact of carrying on business is what gave the Ontario court jurisdiction (irrespective of where the corporation was served). For

69. Importantly, they likely also have jurisdiction based on a real and substantial connection.

70. *Incorporated Broadcasters*, 63 O.R. 3d at para. 30.

71. *Id.* at para. 33.

72. *Id.* at para. 36.

73. *Id.* (citations omitted).

74. It is possible, if not likely, that each of the defendants was served *ex juris*.

instance, the Court of Appeal pronounced that “[b]y choosing to carry on business in Ontario, CanWest Global is subject to the jurisdiction of Ontario courts.”⁷⁵ Again, simply carrying on business in Ontario is not what the Supreme Court of Canada in *Chevron* said constitutes presence-based jurisdiction; rather, presence-based jurisdiction arises from the combination of carrying on business and being served with process in that jurisdiction.⁷⁶ The passage where the Court of Appeal elaborates upon why jurisdiction is appropriate does not contain any reference to service of process. In fact, no mention is made of service of process on the corporations in the entire judgment.

The Ontario Court of Appeal then considered whether there was presence-based jurisdiction over the only natural person defendant in the action, Mr. Asper.⁷⁷ The Court of Appeal’s comments with respect to Mr. Asper make it painfully obvious that it was not referring to presence-based jurisdiction as the Supreme Court of Canada has defined that term in *Chevron*. The Ontario Court of Appeal stated that

Mr. Asper resides in Manitoba. For the purposes of this discussion I will assume that *he was properly served in Ontario*. Whether served in or out of Ontario, since he is an extra-provincial defendant, Ontario courts only have jurisdiction over him if the real and substantial connection test is met.⁷⁸

This passage evidences that the Court of Appeal in *Incorporated Broadcasters* profoundly misunderstands presence as a basis for jurisdiction. The Court of Appeal assumes that the individual defendant was served with process while in Ontario—and yet, concludes that there is no presence-based jurisdiction over him because the defendant is extra-provincial (i.e., is resident somewhere else). The definition of presence-based jurisdiction that the Supreme Court of Canada in *Chevron* provides—service with process while physically in the jurisdiction—is the exact scenario that the Court of Appeal in *Incorporated Broadcasters* says is *not* presence-based jurisdiction. Clearly, the Court of Appeal in *Incorporated Broadcasters* had a very different understanding of presence-based jurisdiction than the Supreme Court in *Chevron*. Accordingly, *Incorporated Broadcasters* is a very poor authority for the Supreme Court of Canada to have used in justifying its notion of presence-based jurisdiction (for either natural persons or corporations).⁷⁹

75. *Incorporated Broadcasters*, 63 O.R. 3d at para. 36.

76. *Chevron*, 3 S.C.R. at para. 94.

77. *Incorporated Broadcasters*, 63 O.R. 3d at para. 37.

78. *Id.* (emphasis added).

79. The error made by *Incorporated Broadcasters* in omitting the critical element of a corporation being served in the jurisdiction (in addition to carrying on business there) has been replicated in the case law. For instance, in *Danks v. Ioli Management Consulting*, 2003 CarswellOnt 3975 (Can. Ont. Sup. Ct. J.) the action was commenced by way of service *ex juris* on the corporation in Virginia under rules 17.02(f)(i), (iv) and

B. Prince v. ACE Aviation Holdings Inc.

Similarly, *Prince* does not provide authority for the proposition that a court can exercise presence-based jurisdiction over a company. The extent of the discussion on the jurisdictional issue in *Prince* is as follows: “Air Canada concedes that it is present and carries on significant business in Ontario. There is no question that this court has jurisdiction over Air Canada. This court has presence-based jurisdiction.”⁸⁰ The Ontario Superior Court of Justice cited *Van Breda* and *Incorporated Broadcasters* for this proposition. Nothing about this passage suggests that this court’s understanding of presence-based jurisdiction supports the Supreme Court of Canada’s understanding of presence-based jurisdiction in *Chevron*. Specifically, it is not known whether Air Canada was served with process in Ontario or whether it was served *ex juris* and the Ontario court is using the mere fact of carrying on business to say that there is presence-based jurisdiction over Air Canada.

C. Abdula v. Canadian Solar Inc.

The Ontario Superior Court of Justice in *Canadian Solar* appears to make the same mistake as the Ontario Court of Appeal in *Incorporated Broadcasters*: interpreting presence-based jurisdiction to mean that jurisdiction is appropriate where there is a significant presence in the jurisdiction (without the requirement that service of process take place in the jurisdiction). The court stated, for instance, “[*Incorporated Broadcasters*] and *Momentous.ca* make[] it clear that the real and substantial connection test has no application to

(h). The corporation was not served in Ontario. Despite this critical fact, the court entertained arguments about presence-based jurisdiction.

The defendant is a Virginia incorporated company. Its head office is in Virginia. Its only office premises are in Virginia. There is no office or place of business in Ontario. It is clearly a resident of Virginia. In my view, the fact that some of the defendant’s clients are in Ontario and that its consultants attend at client sites in Ontario to provide consulting services for specific projects, does not give the defendant a physical “presence” in Ontario. In my view this does not constitute “carrying on business” in Ontario in the sense that Canwest Global was carrying on its substantial communications business in Ontario in the *Incorporated Broadcasters* case.

Id. at para. 9. While the court ultimately came to the conclusion that Ontario did not have presence-based jurisdiction over the corporate defendant, it failed to recognize that presence-based jurisdiction is not even an *option* in cases where the corporation is served *ex juris*. This case, like *Incorporated Broadcasters*, reveals that Canadian courts are misunderstanding what presence-based jurisdiction over corporations entails, believing that corporate presence alone (regardless of service of process) can suffice to ground jurisdiction.

80. *Prince*, 115 O.R. 3d at para. 14.

defendants who have a presence in the jurisdiction.”⁸¹ In applying its view of presence-based jurisdiction to the facts, the court held that

Canadian Solar is a federally incorporated company with executive offices in Kitchener and which carries on business in Ontario. It has held its annual meeting in Ontario. The press releases which the plaintiff alleges contained misrepresentations were issued in Ontario. As the defendants concede in their Factum, “Canadian Solar has Canada written all over it.” Accordingly, I find it unnecessary to analyze issues such as where the alleged misrepresentation was made or received or where reliance on the alleged misrepresentation occurred. Canadian Solar has significant connections to Ontario. Therefore, as stated by Rosenberg J.A. in [*Incorporated Broadcasters*] “Where the defendant is within the jurisdiction, the court has jurisdiction over the person.” On this basis I find that this court has jurisdiction over the claim for negligent misrepresentation.⁸²

As with *Prince*, the court in *Canadian Solar* relies primarily on *Incorporated Broadcasters*. Again, there is no indication that the court in *Canadian Solar* shares the Supreme Court of Canada’s understanding of presence-based jurisdiction.

D. Wilson v. Hull

Wilson pre-dates *Incorporated Broadcasters*, but still does not lend support to the idea that Canadian courts have endorsed presence-based jurisdiction over corporations. In fact, it is unclear how *Wilson* even remotely supports the proposition that Canadian courts have recognized presence-based jurisdiction over corporations. *Wilson* involved an action in Alberta to enforce an Idaho default judgment. A statute in force in Alberta at the time provided that a foreign judgment would not be enforced in Alberta unless the judgment debtor was carrying on business in the foreign jurisdiction (Idaho) at the time of the commencement of the action.⁸³ The court then described what carrying on business meant in the context of the Alberta recognition statute. Nothing in the *Wilson* case can be extrapolated to support the very different proposition that a Canadian court has jurisdiction over a corporation that carries on business in the jurisdiction and is served with process *in juris* at that place of business.

E. Charron v. Banque provinciale du Canada

Finally, the Supreme Court of Canada references an eighty-year-old case in support of its contention that presence-based jurisdiction

81. *Abdula*, 92 B.L.R. 4th at 19.

82. *Id.* at paras. 21–22 (emphasis in original).

83. The statute in *Wilson* provided a simplified procedure for registering foreign judgments and thus imposed requirements that were more stringent than the real and substantial connection test. See 174 A.R. at para. 19.

over a corporation is a well-established feature of Canadian law. *Charron* involved an action initiated in Ontario for professional negligence against a Québec bank.⁸⁴ The defendant bank argued that there was no jurisdiction in Ontario because the land that was the subject matter of the dispute was located in Québec, both the plaintiff and defendant were domiciled in Québec, and the dispute was governed by Québec law.⁸⁵ The plaintiff argued that, because the defendant bank had a branch in Ontario, Ontario had personal jurisdiction over the action.⁸⁶

The Court focused on the question of where the defendant was resident. It quoted English authorities to the effect that “[t]he residence of a defendant in a country at the time when an action is commenced against him is an admitted ground of jurisdiction.”⁸⁷ After looking at several authorities on the residence of a bank and its branches, the court concluded that “[t]he defendant has a residence within Ontario, separate from that of its Head Office in Montreal, sufficient to bring the defendant within the jurisdiction of this Court.”⁸⁸ The Court did not state that, because the bank was carrying on business in Ontario, the bank would be subject to personal jurisdiction in Ontario.

Presumably, there is a difference between carrying on business and residence. In *Van Breda*, the Supreme Court of Canada seemed to imply that residence was synonymous with domicile, as it listed both of these together as the first presumptive connecting factor under the real and substantial connection test.⁸⁹ Moreover, it is not clear from the *Charron* case whether service was effected on the bank *in juris* in Ontario or *ex juris* in Québec. If service was effected *ex juris*, based on the fact that the bank had a branch in Ontario, then the case is wholly inapposite. *Chevron* stands for the proposition that the act of service on a corporation in a place where it is carrying on business suffices to ground jurisdiction there. In short, too much stock should not be placed in an eighty-year-old case that purports to pinpoint the residence of a bank for jurisdictional purposes and says nothing specifically about carrying on business as a basis for jurisdiction.

F. Summary

None of these cases supports the proposition that the Supreme Court of Canada claims they do: that “Canadian courts have found that

84. *Charron*, O.W.N. 315.

85. *Id.*

86. *Id.*

87. *Id.* (quoting A.V. DICEY, JOHN H.C. MORRIS & LAWRENCE COLLINS, CONFLICT OF LAWS 403 (5th ed. 1932)).

88. *Id.*

89. *Van Breda*, 1 S.C.R. at para. 86.

jurisdiction exists in . . . circumstances” where a corporate defendant is carrying on business in the forum and is served with process there.⁹⁰ *Incorporated Broadcasters* shows that courts are confused about what presence-based jurisdiction is and how it applies both to individuals and to corporations. Importantly, *Incorporated Broadcasters* conceptualizes presence-based jurisdiction as simply requiring a corporation’s presence in the jurisdiction, regardless of where that corporation was served with process. *Prince* and *Canadian Solar* replicate the mistake made in *Incorporated Broadcasters* by omitting the service *in juris* component of the presence-based jurisdiction rule. *Wilson* dealt with what carrying on business meant for the purpose of an enforcement statute and, accordingly, does not lend any support to the proposition that Canadian courts have recognized presence-based jurisdiction over corporations. And *Charron*, while it provides some support for presence-based jurisdiction, must be read with skepticism owing to its age and its focus on the residence of a defendant bank.

Moreover, if presence-based jurisdiction over corporations were so longstanding and prevalent, there would be more than a handful of cases that discuss and apply it. Similarly, a significant number of cases would rely on presence as a basis of jurisdiction, given how easy it is to serve a corporation where it is doing business.⁹¹ The dearth of case law is surprising given how well-established this ground of jurisdiction is

90. *Chevron*, 3 S.C.R. at para. 86.

91. Take, for instance, the Supreme Court decision in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63 (Can.). In that case, the Court premised jurisdiction in Ontario on Unifund’s attornment to the jurisdiction of the Ontario courts. However, Justice Bastarache at one point stated that Unifund was carrying on business in Ontario. As Edinger and Black point out, if this is true, then the basis of jurisdiction should have been presence and not attornment:

We suggest that such blurring is unfortunate and improper, and that Bastarache J.’s one-sentence assertion that Unifund was carrying on business in Ontario is wrong, or at least at odds with the rest of his judgment. A corporation that is carrying on business in a jurisdiction is held to be present there, and such presence — or, more accurately, service on that corporation while it is present — gives rise to general personal jurisdiction over that defendant. That is, if someone is served while present in a common law province then that province’s courts have jurisdiction regardless of the subject-matter of the suit (providing, of course, that there are no objections to the suit on grounds of subject-matter jurisdiction, *e.g.* that it concerns title to real property located outside the province). Thus, if ICBC was carrying on business in Ontario, anyone would be able to assert Ontario jurisdiction over it with regard to any matter. But that conclusion is at odds with the remainder of Bastarache J.’s judgment. Thus, in light of the fact that the bulk of his reasoning on the jurisdictional point focuses on attornment by agreement (which, of course, can be for limited purposes), his one-sentence assertion that ICBC was carrying on business in Ontario must be seen to have at best a peripheral status.

Elizabeth Edinger & Vaughan Black, *A New Approach to Extraterritoriality: Unifund Assurance Co. v. I.C.B.C.*, 40 CAN. BUS. L.J. 161, 170 n.20 (2004).

purported to be.⁹² Tag jurisdiction over corporations seems to be Canada's best-kept secret.

In reality, Canadian courts have never examined in any detail what presence means in the context of a corporation. To be sure, there are a number of references to "presence-based jurisdiction" and "presence as a traditional basis for jurisdiction" in the case law, but there is little elaboration beyond that.⁹³ This is particularly startling given that U.S. courts have been struggling to define and refine the concept of corporate presence for over a hundred years. Canadian courts seem to have uncritically assumed that the same presence principles that apply to a natural person can automatically be transposed onto a corporation. But they cannot—and should not—without deliberate forethought. Corporations are not human beings that are capable of being personally served while physically present in a jurisdiction. A process server cannot physically put a statement of claim into the hands of a corporation, as it can for an individual.⁹⁴

92. *Lixco Investments Ltd. v. Gowling, Lafleur, Henderson and Guy Poitras*, 2013 ONSC 4862 illustrates the principle that presence-based jurisdiction is not a well-established feature of the Canadian jurisdictional landscape. In *Lixco*, the plaintiff initiated an action for professional negligence in Ontario against the defendant law firm and one of its partners. The law firm, Gowlings, had offices in both Ontario and Québec. While the facts do not indicate where Gowlings was served with process, the court proceeded to apply the *Van Breda* test for assumed jurisdiction, concluding that jurisdiction was appropriate because Gowlings carried on business in Ontario. *Id.* at para. 17 ("It is clear that Gowlings carries on business in Ontario."). If Gowlings carried on business in Ontario (a fact that could hardly be disputed), why did the court not simply say that it had presence-based jurisdiction? Why, in other words, did the court have to resort to the real and substantial connection test? This case demonstrates that sophisticated litigants (or more specifically, their legal counsel) are simply not aware that service of process on a corporation that is carrying on business confers jurisdiction over that corporation.

93. Importantly, even those cases that reference presence-based jurisdiction over corporations fail to recognize that it is the act of service of process *in the province* at the place where the corporation is carrying on business that confers jurisdiction. Most courts simply refer to the corporation's general presence in the province as a basis for jurisdiction, not appreciating the vital distinction between service *in juris* (which would support presence-based jurisdiction) and service *ex juris* (which would support assumed jurisdiction). See, e.g., *Carrera v. Coalcorp Mining Inc.*, 2009 CarswellOnt 3859 (Can. Ont. S.C.) (raising the possibility of presence-based jurisdiction over corporate defendants that had been served *ex juris*); *Williams v. Fed. Plastics Mfg. Ltd.*, 2007 CarswellOnt 4350 (Can. Ont. S.C.) (discussing presence-based jurisdiction as a possibility where it appeared that the defendant had been served *ex juris*); *ABN Amro Bank N.V. v. BCE Inc.*, 2003 CarswellOnt 2890 (Can. Ont. S.C.) (finding that the Ontario court had presence-based jurisdiction over the defendant, but then proceeding to state that the Ontario court also had assumed jurisdiction).

94. Steven Mathew Wald, *The Left-for-Dead Fiction of Corporate Presence: Is It Revived by Burnham?*, 54 LA. L. REV. 187, 187 (1993) ("It is essential to distinguish between individuals and corporations because the intangible quality of corporations makes it much more difficult to determine when and where a corporation is 'present'; in contrast, individuals are present wherever they may be found."); J.J. Fawcett, *A New Approach to Jurisdiction over Companies in Private International Law*, 37 INT'L & COMP.

What presence means for a corporation is a very important question, given the very significant consequences that flow from the assertion of presence-based jurisdiction: jurisdiction for any claim brought by any plaintiff based on any cause of action arising anywhere in the world.

IV. CONCEPTUAL PROBLEMS WITH PRESENCE-BASED JURISDICTION OVER CORPORATIONS

Aside from the fact that the Supreme Court of Canada cites no compelling authority for the proposition that simply serving a corporation that is carrying on business with service of process *in juris* confers jurisdiction, there are several conceptual problems with this particular view of presence-based jurisdiction over corporations. First, the Court has created an exceptionally low standard for a corporation to be carrying on business. This low standard means that provincial courts will have universal jurisdiction over many corporations—something the Court appeared concerned about in *Van Breda*. Second, the Court's endorsement of presence-based jurisdiction means that resorting to the real and substantial connection test is now unnecessary in many cases. Third, the Court's decisions in *Chevron* and *Van Breda* are an uncomfortable fit. In particular, *Van Breda's* presumptive connecting factor that looks to whether the corporation was carrying on business in a province is now a nullity.

A. *Chevron's Low Standard for Carrying On Business Means that Canadian Courts Have Universal Jurisdiction over Many Corporations*

1. *Chevron* Has Created a Very Low Standard for Carrying On Business

The Supreme Court of Canada in *Chevron* created a very low standard for carrying on business in a province. It found that presence-based jurisdiction over *Chevron* Canada existed simply because *Chevron* Canada was served with process at a "bricks and mortar office from which it carrie[d] out a non-transitory business with human means."⁹⁵ The Court did not inquire into the extent of the business carried out in Ontario, the number of employees in the province, the volume of sales or purchases in the province, or any other indicators of carrying on business.

Furthermore, it failed to consider facts that tended to weigh against the conclusion that *Chevron* Canada was carrying on business

L.Q. 645, 646 (1988) ("The position in cases where the defendant is a company is much less straightforward. A company is an artificial entity and, as such, cannot literally be present or resident in the forum.").

95. *Chevron*, 3 S.C.R. at para. 86.

in Ontario. For instance, it did not consider that only three (out of seven hundred) Chevron Canada employees worked at the physical office in Ontario. This represents a mere 0.004 percent of the Chevron Canada workforce. The Court also glossed over the fact that it was only a division of Chevron Canada (its lubricant division) that was located in Ontario.⁹⁶ And the Court did not consider the extent of business that Chevron Canada carried out in Ontario: What were its sales in Ontario? What percentage of its total revenue did these sales comprise? Did the Chevron Canada employees work exclusively in Ontario, or did they travel to other provinces? None of these questions were addressed. In short, the Court affirmed the finding that Chevron Canada was carrying on business based on very limited facts. Those facts that it did use to support the conclusion that there was presence-based jurisdiction over Chevron Canada suggest that the hurdle for finding that a corporation is carrying on business is extremely low.⁹⁷

Further complicating the inquiry is the fact that the Court cited case law that implies that a physical place of business is not necessarily required to find that a corporation is carrying on business. The Court cited the Alberta Court of Appeal's decision in *Wilson v. Hull*⁹⁸ for the proposition that carrying on business requires "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."⁹⁹ The Court further stated that "the common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor [in determining whether a corporation is carrying on business]."¹⁰⁰ Finally, the Court pointed to *Van Breda's* guidance that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there."¹⁰¹

All of these references suggest that it may not be necessary for a corporation to have a physical place of business in a province in order

96. Chevron Canada's website is completely distinct from Chevron Lubricants' website. Compare CHEVRON CANADA, <http://www.chevron.ca/> (last visited Feb. 2, 2017) [<https://perma.cc/6574-SD95>] (archived Feb. 2, 2017) with CHEVRON LUBRICANTS, <http://canada.chevronlubricants.com/> (last visited Feb. 2, 2017) [<https://perma.cc/G4TT-LV7K>] (archived Feb. 2, 2017).

97. See, e.g., *Stuart Budd & Sons Ltd. v. IFS Vehicle Distrib. ULC*, 2016 ONSC 2980 (Can.), *aff'd*, 2016 ONCA 977 (Can.) (finding that the defendant was carrying on business in Ontario, for the purpose of the *Van Breda* presumptive connecting factor, based on a very limited business presence in Ontario). The Ontario Court of Appeal in *Stuart Budd* suggested that *Chevron* was actually an example of a case where the defendant had a "more substantial presence" in Ontario than the defendant in *Stuart Budd* itself. This can be read to support the proposition that a business presence even less compelling than that in *Chevron* can suffice to establish presence-based jurisdiction.

98. *Wilson*, 174 A.R. at para. 52.

99. *Chevron*, 3 S.C.R. at para. 85 (emphasis added) (quoting *Wilson*, 174 A.R. at para. 52).

100. *Id.*

101. *Id.* (quoting *Van Breda*, 1 S.C.R. at para. 87).

to subject it to presence-based jurisdiction. The reference, for instance, to "indirect presence" implies that a corporation could be found to be carrying on business in a jurisdiction where it does not have a physical place of business. Similarly, the reference to physical premises being a "compelling jurisdictional factor"—rather than a necessary jurisdictional factor—also suggests that a physical place of business may not be required to assert presence-based jurisdiction over a corporation. Finally, the quote from *Van Breda* provides that carrying on business requires some sort of actual presence in a province, *such as* maintaining an office there. It is clear from this statement that maintaining an office is an example of a situation that denotes actual presence, but maintaining an office is not necessarily required to ground presence-based jurisdiction.

It seems, then, that presence-based jurisdiction could conceivably be asserted over a corporation by virtue of service of process on one of its employees while he is physically present in the province (but not physically present at a place of business). For instance, in *Chevron* itself, there were only three employees located at the Chevron Canada office in Ontario.¹⁰² The other ten employees worked in Ontario out of their homes.¹⁰³ If one of the ten employees had been served at home, it could have conceivably still grounded jurisdiction over Chevron Canada under the Supreme Court of Canada's theory of presence-based jurisdiction.

An issue that the Supreme Court of Canada did not address was the *timing* of when a corporation is carrying on business for the purpose of the jurisdictional test. In *Chevron*, Chevron Canada's business presence in Ontario was established the same month that the enforcement action was filed.¹⁰⁴ It would stand to reason that at the time the enforcement action was filed in Ontario, Chevron Canada's business activities in Ontario were not "sustained for a period of time."¹⁰⁵ This raises the question of what the reference point is for whether the defendant is carrying on business. Is a court to look at the defendant's business activities at the time the lawsuit is filed? Or, should a court confine itself to examining a defendant's business activities at the time the underlying conduct that forms the basis of the lawsuit took place? If a case is appealed, as in *Chevron* itself, can a court consider the business activities of the defendant that took place between the initial lawsuit and the appeal? Clearly, the Court considered Chevron Canada's business activities in Ontario that post-dated the lawsuit (since Chevron Canada had just barely established a commercial presence in Ontario at the time the lawsuit was filed).

102. Factum of the Appellant Chevron Can. Ltd., *supra* note 8, at para. 12.

103. *Id.* at para. 40.

104. *Id.* at para. 12.

105. *Chevron*, 3 S.C.R. at para. 85 (quoting *Wilson*, 174 A.R. at para. 52).

Considering business activities that post-date the lawsuit as grounds for jurisdiction over the lawsuit seems nonsensical. How can a court that lacks jurisdiction at the beginning of the lawsuit somehow acquire jurisdiction by virtue of the passage of time (and the concomitant increase in business activity that takes place over time)? Either a court has jurisdiction over the lawsuit at the time the action is commenced, or it does not. A plaintiff should not be able to obtain jurisdiction over a defendant simply by having time go by and letting the corporate defendant's connection with a given province become more established.

Overall, it is clear that the Court in *Chevron* endorsed a very low standard for carrying on business. It even intimated that a physical place of business might not be required in order to find that a company is carrying on business in a province. If this is the case, then plaintiffs would be wise to serve a corporation *in juris* if there is any business being done in a province. And, if a court accepts the argument that the corporation is carrying on business (under the low standard adopted in *Chevron*), then jurisdiction over any and all claims is automatically established.

2. *Chevron* Results in Universal Jurisdiction over Corporations

Interpreting presence-based jurisdiction over corporations in the way that the Supreme Court of Canada in *Chevron* did may result in universal assertions of jurisdiction over corporations that are carrying on business in a province. As discussed, the threshold for carrying on business is low: the corporation need only conduct some regular business in the province and be physically served there. As the result in *Chevron* itself shows, even if a corporation only has a few employees in the province, this will suffice for the purposes of presence-based jurisdiction. Once a corporation is served with process in the province, the corporation is subject to jurisdiction for any and all claims involving the corporation. This is the crux of the problem with presence-based jurisdiction for corporations: it results in universal jurisdiction over corporations. What is it about the act of service in a province where the corporation is carrying on business that entitles the plaintiff to have *any matter* adjudicated in the province, including (and especially) those that are wholly unconnected with the province? What is the conceptual justification for universal jurisdiction over corporations based purely on service of process in a province where it carries on business? The Court does not answer these difficult questions.¹⁰⁶

106. The closest thing to a justification for presence-based jurisdiction is found at paragraph 89:

Interestingly, however, the Court does appear concerned about universal jurisdiction, albeit in the context of assumed jurisdiction. In discussing the presumptive connecting factor of "carrying on business" in *Van Breda*, the Court stated the following:

Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity.¹⁰⁷

Ironically, the Court in *Chevron* appeared oblivious to the very concern (universal jurisdiction) that had troubled it just a few years earlier in *Van Breda*. The Court in *Van Breda* was careful to point out that the "carrying on business" presumptive connecting factor could be rebutted by showing that the business carried on in the province had little or nothing to do with the underlying cause of action.¹⁰⁸ In *Chevron*, however, there is no ability to defeat jurisdiction by arguing that the business carried on is unrelated to the cause of action.¹⁰⁹ Instead, once service of process is validly effected on a corporation carrying on business in the province, the plaintiff has met the burden of establishing jurisdiction *simpliciter*.

The difference in result can be explained simply: service *in juris* entitles a court to assume jurisdiction over any matter involving the defendant, while service *ex juris* entitles a court to assume jurisdiction over matters that are sufficiently connected with the province. But this still does not answer the question of why. *Why* does service *in juris* on a corporation carrying on business in a province result in automatic jurisdiction over the defendant?¹¹⁰ The Court alludes to history and

Chevron Canada has elected to establish and continue to operate a place of business in Mississauga, Ontario, at which it was served. It should therefore have expected that it might one day be called upon to answer to an Ontario court's request that it defend against an action. If a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved.

Chevron, 3 S.C.R. at para. 89. The Court does not explain, however, why *Chevron's* business activities in Ontario would give rise to the expectation that it could be sued in Ontario in respect of claims that have nothing to do with its business. In other words, the Court does not explain why presence-based jurisdiction should confer general jurisdiction over a corporation.

107. *Van Breda*, 1 S.C.R. at para. 87.

108. *Id.* at para. 96.

109. At least with respect to jurisdiction *simpliciter*. A defendant may still be able to argue that the case should be stayed or dismissed on the basis of *forum non conveniens*.

110. This same argument was accepted by the U.S. Supreme Court in *Daimler*. There, Justice Ginsberg stated that "[n]othing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over

tradition, but, as discussed above, the Court provides very little support for this proposition. So what is left is an unsettling variant of “just because” in order to answer the question of why service *in juris* on a corporation carrying on business in a province confers general jurisdiction.

One might argue that this emphasis on universal or exorbitant jurisdiction is overstated. That is, just because a court *can* hear a case does not necessarily mean that a court *will* hear a case. A corporation that is subject to presence-based jurisdiction could still argue under the doctrine of *forum non conveniens* that there is a more appropriate forum somewhere else. Accordingly, the fear that a corporation might be subject to all-purpose jurisdiction is not as acute as it might otherwise appear. Whether a court uses *forum non conveniens* to remedy any perceived unfair assertions of jurisdiction depends, however, on how a court views presence-based jurisdiction over corporations. The Supreme Court of Canada repeatedly emphasized that presence is a “traditional” basis of jurisdiction, noting that its historical roots “cannot be over-emphasized.”¹¹¹ It contrasted presence-based jurisdiction with assumed jurisdiction: “[a]ssumed jurisdiction, for its part, emerged much later and developed through the adoption of rules for service *ex juris* When a court finds that it has jurisdiction on this basis, that jurisdiction is limited to the specific action at issue before it.”¹¹² In drawing the distinction between “traditional” presence-based jurisdiction and the “much later” developed assumed jurisdiction, the Court implied that the former was a more compelling form of jurisdiction—hence the reason that it entitled a court to assume jurisdiction over any cause of action before it. It would seem strange, then, for courts to employ the doctrine of *forum non conveniens* to displace jurisdiction in a forum that has general jurisdiction over a corporation. In other words, presumably those situations that the law regards as sufficient to confer general jurisdiction (such as presence and domicile¹¹³) should be those situations where a court does not stay an action on the basis of *forum non conveniens*.

Ultimately, the *Chevron* decision opens up jurisdiction in a way that few had contemplated. Corporations carrying on any sort of business activity in Canada should be wary that they will be subject to general jurisdiction in provincial courts. Unfortunately, there is little explanation for this form of universal jurisdiction beyond the Court’s reference to history and tradition.

a ‘far larger quantum of . . . activity’ having no connection to any in-state activity.” *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014).

111. *Chevron*, 3 S.C.R. at para. 83.

112. *Id.* (citations omitted).

113. The Court in *Van Breda* muddied the waters with respect to domicile, making it only a presumptive connecting factor—but then saying that the presumption would rarely, if ever, be displaced. See *Van Breda*, 1 S.C.R. at para. 87.

B. *Chevron Obviates the Need for Resorting to the Real and Substantial Connection Test in Many Cases*

The Supreme Court of Canada in *Chevron* was careful to distinguish between presence-based jurisdiction predicated on service *in juris* and assumed jurisdiction predicated on service *ex juris*. What it failed to recognize, however, is that its holding that corporations are subject to jurisdiction if they are served in a province where they are carrying on business means that resorting to assumed jurisdiction (the real and substantial connection test) will now be unnecessary in many cases. As long as the defendant carries on business in the province and there is some place where it can be served with process,¹¹⁴ this will likely meet the standard that the Court set out in *Chevron*.

Consider, for instance, the facts of *Charron*, one of the two *Van Breda* companion cases. In *Charron*, the defendant, Club Resorts, was held to have been 'carrying on business' in Ontario under the presumptive connecting factors approach to jurisdiction. The Court stated that

Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis. It benefited from the physical presence of an office in Ontario. Most significantly, on cross-examination Club Resorts' witness admitted that it was in the business of carrying out activities in Canada. Together, these facts support the conclusion that Club Resorts was carrying on business in Ontario.¹¹⁵

In *Charron*, the defendant was served *ex juris*, hence the Court's application of the real and substantial connection test.¹¹⁶ However, if the defendant had been served in Ontario at the office referenced by the Court, this likely would have sufficed to meet the *Chevron* standard for presence-based jurisdiction.¹¹⁷ Ironically the *Chevron* Court's holding on presence-based jurisdiction would mean that the leading case on assumed jurisdiction should not have been a case on assumed jurisdiction at all. The plaintiffs in *Charron* should simply have served Club Resorts at the office it was using in Ontario and then relied on "traditional"¹¹⁸ presence-based jurisdiction.

114. It may be that a physical location is not even required. See *infra* Section IV.A.1.

115. *Van Breda*, 1 S.C.R. at para. 122.

116. *Id.* at paras. 113-14.

117. The only caveat is that the office that Club Resorts carried out business from was not its own, but rather that of SuperClubs, a group with whom Club Resorts was associated. *Id.* at para. 5.

118. The Supreme Court referred to presence-based jurisdiction as a "traditional" ground of jurisdiction well over a dozen times in the judgment. See *e.g.*, *id.* at paras. 36, 47, 55, 77-79.

It would appear that any case that would qualify under *Van Breda* as carrying on business would also qualify under *Chevron* as carrying on business. So, why would a plaintiff ever choose to serve a defendant corporation *ex juris*, rather than serving the corporation *in juris*? In the former situation, the plaintiff would need to establish that the corporation's business is connected to the underlying cause of action. In the latter case, however, the act of service in the province automatically confers jurisdiction *simpliciter*. There is no ability for the defendant to contest jurisdiction on the basis of a lack of connection between the cause of action and the province.¹¹⁹

From a perusal of the case law post-*Chevron*, it does not appear that litigants have picked up on this easy way of establishing personal jurisdiction.¹²⁰ For instance, in *Stuart Budd & Sons Ltd. v. IFS Vehicle Distribs. ULC*,¹²¹ which was decided eight months after the Supreme Court of Canada's decision in *Chevron*, the plaintiff argued (and the Court accepted) that jurisdiction was appropriate because the defendant corporation was carrying on business in Ontario.¹²² In that case, the defendant corporation had been served *ex juris*, and, consequently, the Court examined the application of the real and

119. *Wilson v. Riu*, 2012 ONSC 6840 illustrates this disconnect between carrying on business as a presumptive connecting factor and carrying on business as a basis for presence-based jurisdiction. In *Wilson*, the plaintiffs sued the defendant, Thomas Cook, for injuries sustained as part of an excursion during a vacation to Jamaica. The court applied *Van Breda* and concluded that Thomas Cook was carrying on business in Ontario. However, the court found that Thomas Cook rebutted the presumption of jurisdiction that arises from the application of this presumptive factor:

However, I am satisfied on the evidence that they have discharged the onus on them to rebut the presumption. Thomas Cook packaged the air and ground transportation as well as the hotel accommodation for the male Plaintiff's trip, but had nothing to do with the booking of the horseback riding excursion. To require a tour packager like Thomas Cook to have to respond to claims in Ontario when some type of misfortune is experienced in a foreign jurisdiction by a patron, by reason only of having sent him or her there as part of a travel package, would open the Ontario court to universal assumption of jurisdiction.

Id. at para. 13. Accordingly, the court did not assert jurisdiction over Thomas Cook. However, if the plaintiffs had served Thomas Cook in Ontario, they would have automatically established presence-based jurisdiction. The fact that the plaintiffs (or, more accurately, their attorney) chose not to serve Thomas Cook *in juris* is further evidence that presence-based jurisdiction over corporations was not a well-entrenched jurisdictional principle prior to *Chevron*.

120. Or, it could be that service of process in these cases pre-dated the Court's pronouncement in *Chevron*. In either event, however, the fact that sophisticated parties represented by competent law firms are unaware that jurisdiction over corporations can be established simply by serving a corporation *in juris* casts doubt on the Supreme Court's judgment in *Chevron* and its repeated indications that the practice is longstanding and well-established.

121. 2015 ONSC 519 (Can.), *aff'd*, 2016 ONCA 977 (Can.).

122. *Id.* at para. 38.

substantial connection test.¹²³ The Court documented in detail the reasons why it concluded that the defendant carried on business in Ontario.¹²⁴ It also indicated that there was a physical address in Ontario from which the defendant carried on business.¹²⁵ The defendant in *Stuart Budd* did not rebut the presumption of jurisdiction that arose from the plaintiff satisfying the “carrying on business” presumptive connecting factor. What does not make sense about the *Stuart Budd* decision is why, if the defendant was carrying on business in Ontario, the plaintiff did not serve the defendant in Ontario. Then the *Van Breda* framework could have been avoided in its entirety, and the plaintiff would simply have established presence-based jurisdiction under *Chevron*. The fact that counsel chose not to serve process *in juris* is revealing. It shows that jurisdiction based on the presence of a corporation in a province when served with process is decidedly *not* an established or traditional feature of the Canadian jurisdictional landscape. It could be that, as lawyers begin to appreciate the implications of the Court’s decision in *Chevron*, many more cases will be disposed of on the basis of presence-based jurisdiction and that the real battle will be fought in *forum non conveniens* motions.

C. Presence-Based Jurisdiction in *Chevron* Is Conceptually Misaligned with *Van Breda*

At a macro level, the Supreme Court of Canada’s endorsement of presence-based jurisdiction over corporations is inconsistent with its restrictive approach to assumed jurisdiction in *Van Breda*. Part of the purpose behind the *Van Breda* framework was to restrict jurisdictional assertions that had become exorbitant.¹²⁶ Under the approach that prevailed in *Muscutt v. Courcelles*,¹²⁷ courts could (and would) assume jurisdiction over cases that had a very tenuous connection to the province. The Court in *Van Breda* sought to remedy this concern by providing guidance on the categories of cases where a defendant would be subject to jurisdiction. *Van Breda*, in other words, was intended to narrow the assertion of personal jurisdiction over defendants. The rule articulated in *Chevron*, however, dramatically expands personal jurisdiction doctrine. Thus, there is a tension between the restrictive *Van Breda* approach to *ex juris* service and the expansive *Chevron* approach to *in juris* service.

At a micro level, interpreting presence-based jurisdiction over a corporation in the way the Court did in *Chevron* creates a conceptual

123. *Id.* at para. 35.

124. *Id.* at paras. 36–51.

125. *Id.* at para. 48.

126. *Van Breda*, 1 S.C.R. at paras. 23, 66.

127. *Muscutt*, 60 O.R. 3d. 20.

misalignment with the Court's approach to assumed jurisdiction in *Van Breda*. In *Van Breda*, the Court laid out a framework for approaching the real and substantial connection test, as a conflict of laws rule, in the context of tort claims.¹²⁸ It endorsed a presumptive connecting factors approach, whereby jurisdiction would be presumed in cases fitting within the Court's four presumptive connecting factors.¹²⁹ The Court also left open the possibility that additional presumptive connecting factors could be added to the list, as the necessity arose.¹³⁰ The Court determined that, in tort cases, the following presumptive connecting factors would *prima facie* permit a court to assume jurisdiction over a dispute:

- (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.¹³¹

Two of these factors (domicile/residence and carrying on business) do not fit well with the view of presence-based jurisdiction over corporations that the Court endorsed in *Chevron*. Each will be discussed in turn.

1. Domicile/Residence as a Basis for Jurisdiction

First, the Supreme Court of Canada in *Van Breda* determined that domicile or residence in the province was a presumptive connecting factor that would *prima facie* entitle a court to assume jurisdiction.¹³² The Court suggested that *all* of the factors were rebuttable, which would necessarily include the domicile/residence ground for jurisdiction. It stated that

[t]he presumption with respect to a factor will not be irrebuttable The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is

128. See *Van Breda*, 1 S.C.R. at paras. 73, 90–91.

129. For a critique of the Supreme Court of Canada's judgment in *Van Breda*, see Monestier, *supra* note 58.

130. *Van Breda*, 1 S.C.R. at para. 91.

131. *Id.* at para. 90.

132. See *id.* at paras. 86, 90.

properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test.¹³³

However, the Court went on to say that “a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).”¹³⁴ The fact that domicile/residence is on the list of rebuttable presumptive factors, but that the Court states that a defendant may “always” be sued where he or she is domiciled or resident, creates some confusion. Consequently, it is unclear whether domicile is a rebuttable or an irrebuttable basis for jurisdiction.

One might think that, if the domicile/residence ground for jurisdiction were irrebuttable, it would not be included on a “presumptive” and “rebuttable” connecting factors list. For argument’s sake, it is assumed that the Supreme Court of Canada contemplated that the domicile/residence ground for jurisdiction could be rebutted. If that is true, then, in some circumstances, a court would not have jurisdiction *simpliciter* over a corporate defendant even though that corporate defendant is domiciled or resident in the forum.

In *Chevron*, the Court stated that a corporation that is carrying on business in the forum is automatically subject to personal jurisdiction (under a presence theory) if it is served with process in the forum.¹³⁵ Thus, any corporation that is carrying on business within the meaning of *Chevron* and is served with process *in juris* is subject to personal jurisdiction and answerable for any type of claim arising anywhere in the world. It is odd that a corporation that is domiciled in the forum (and thus has a very significant connection to the forum) *may not* be subject to jurisdiction because of the rebuttable presumption in *Van Breda*, but that a corporation that is simply carrying on business and is served with process *in juris* (and thus may not have a particularly significant connection with the forum) *is automatically* subject to jurisdiction on a presence-based theory under *Chevron*. Accordingly, the Supreme Court of Canada’s treatment of domicile/residence (in *Van Breda*) and presence (in *Chevron*) is an incongruous fit.

2. Carrying on Business Under the *Van Breda* Framework

In *Van Breda*, the Supreme Court of Canada indicated that ‘carrying on business’ in the province was a presumptive connecting factor in tort cases.¹³⁶ First, it is not clear whether carrying on business

133. *Id.* at para. 81.

134. *Id.* at para. 86.

135. *Chevron*, 3 S.C.R. at para. 94.

136. *Van Breda*, 1 S.C.R. at para. 87.

for the purposes of *Van Breda* is the same as, or different from, carrying on business for the purpose of service *in juris*. One would assume that they are the same (or at least very similar) tests, if for no other reason than they bear the same moniker.¹³⁷

Assume that a U.S. pharmaceutical company that operates primarily in the United States sets up a small three-person office in Ontario to distribute pharmaceutical products in Canada. Assume further that a resident of New York was prescribed a drug manufactured by the pharmaceutical company in New York and suffered personal injury in New York. Instead of suing in New York, the plaintiff decides to sue in Ontario. Is this permissible? Under presence-based jurisdiction (*Chevron*), the answer is yes; under the presumptive connecting factors framework (*Van Breda*), the answer is no.

With respect to presence-based jurisdiction, if a company has a physical location in Ontario, is carrying on business there, and is served with process there, then Ontario has presence-based jurisdiction according to *Chevron*.¹³⁸ Thus, the key would be to serve the U.S. pharmaceutical company at its business location in Ontario. If the U.S. pharmaceutical company were served *ex juris* at its principal place of business in the United States, on the other hand, then jurisdiction would not be automatic. Rather, the plaintiff would need to fit himself within one of the presumptive connecting factors (carrying on business) and the defendant pharmaceutical company would have the ability to rebut the presumption of jurisdiction. Given that the cause of action arose in New York and had nothing to do with Ontario, the defendant pharmaceutical company would easily be able to rebut this presumptive connecting factor. Again, it is strange that the results could be so variable depending on whether a corporation is served *in juris* or *ex juris*. *Chevron Canada* made this same point in its factum:

[A] corporation with its head office out of Ontario and a place of business in Ontario could be served in Ontario (under Rule 16.02(1)(c) or (e)) or served *ex juris* on the basis that it carries on business within Ontario (under Rule 17.02(p)). To conclude that different jurisdictional analyses should follow would be illogical and unprincipled—and thus contrary to the principles of order and fairness that underlie the rules of private international law—as it could lead to

137. In *Stuart Budd & Sons Ltd. v. IFS Vehicle Distrib. ULC*, 2016 ONSC 60 (Can.), *aff'd*, 2016 ONCA 977 (Can.) at paras. 7–17, the Ontario Court of Appeal seemed to suggest that the determination of “carrying on business” is the same for both the purposes of presence-based jurisdiction (*Chevron*) or assumed jurisdiction (*Van Breda*). In *Stuart Budd*, the Court cited *Chevron*’s holding on carrying on business (presence-based jurisdiction) to support its conclusion that the defendant was carrying on business under the *Van Breda* framework.

138. *Chevron*, 3 S.C.R. at para. 94.

differing jurisprudential results on the same facts based only on which of the two methods of service was used.¹³⁹

Thus, a plaintiff would fare better by serving a corporation that is arguably carrying on business in Ontario at its place of business in Ontario.¹⁴⁰ If a court agrees that the corporation is indeed carrying on business in Ontario, then the Ontario court has jurisdiction over any and all claims against that corporation. Given that jurisdiction would be based on presence (rather than the real and substantial connection test), the defendant would not have the ability to argue that the business carried on is unrelated to the underlying cause of action. If the plaintiff had instead served the defendant corporation *ex juris*, the defendant would retain the ability to argue that, while it may have been carrying on business in Ontario, that business was not related to the underlying cause of action and, accordingly, an Ontario court should not assume jurisdiction. The very same factual predicate (carrying on business) would lead to different jurisdictional consequences, depending on the technicalities of service. Such a result encourages gamesmanship and raises questions about the fairness of the current framework for the assertion of jurisdiction.

V. THE U.S. APPROACH TO PRESENCE-BASED JURISDICTION AND CORPORATIONS

To understand how much of an outlier the Canadian approach is, it is helpful to examine how courts in the United States have dealt with the issue of corporations and presence-based jurisdiction. At the outset, it is important to note that U.S. courts do not recognize the validity of the pure presence-based form of jurisdiction for corporations that the Supreme Court of Canada in *Chevron* has appeared to embrace.¹⁴¹ In

139. Factum of the Appellant Chevron Can. Ltd., *supra* note 8, at para. 50.

140. The same analysis is true under the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA"). Section 10 of the CJPTA provides that there is a presumption of jurisdiction that arises when a corporation is "carrying on business" in the province. Provincial rules of civil procedure, in turn, authorize service out of the jurisdiction on the basis that the corporation is carrying on business in the province. However, the CJPTA also provides for jurisdiction over a corporation if the corporation is "ordinarily resident" in the province. This is defined for a corporation to include, *inter alia*, that the corporation is carrying on business in the province. Accordingly, there is no need to resort to service out rules where the corporation is carrying on business in the province. It is far more effective for a plaintiff to simply serve the defendant corporation *in juris*, thereby subjecting that corporation to automatic presence-based jurisdiction. *See, e.g., Court Jurisdiction and Proceedings Transfer Act*, UNIFORM LAW CONFERENCE OF CANADA, <http://www.ulcc.ca/en/home/183-josetta-1-en-gb/uniform-actsa/court-jurisdiction-and-proceedings-transfer-act/1092-court-jurisdiction-proceedings-transfer-act> (last visited Feb. 7, 2017) [<https://perma.cc/6VEZ-VPJ6>] (archived Feb. 7, 2017).

141. *See, e.g., Martinez v. Aero Caribbean*, 764 F.3d 1062, 1064 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015):

other words, there is no tag jurisdiction over corporations in the United States. A corporation cannot be subject to jurisdiction in a state simply because it carries on business in a state and is served with process at its place of business in that state.¹⁴²

We must decide whether, under *Burnham v. Superior Court*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), service of process on a corporation's officer within the forum state creates general personal jurisdiction over the corporation. We hold that *Burnham* does not apply to corporations. A court may exercise general personal jurisdiction over a corporation only when its contacts "render it essentially at home" in the state.

142. With that said, there is a form of jurisdiction in the United States that seems to resemble tag jurisdiction—though it is premised on consent, and not presence. Every state has a registration statute that requires a corporation that is doing business in the state to register with the state and appoint an agent for service of process. If a corporation does business in the state without registering pursuant to the appropriate state statute, then the corporation risks fines and other penalties. Some states have interpreted their registration statutes as conferring general jurisdiction over a corporation that has registered pursuant to the state statute. The theory relied upon by these states is that by registering to do business in a state, the corporation has voluntarily subjected itself to the state's all-purpose jurisdiction. Stated differently, by virtue of registering under a state statute, a corporation has consented to give a state jurisdiction over the corporation in respect of any and all causes of action. This form of jurisdiction is currently being challenged in the courts and by commentators as being unconstitutional. For commentators, see Kevin Benish, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction after Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609 (2015) (evaluating general personal jurisdiction based on a "consent-by-registration" theory and arguing that this old basis of jurisdiction is unconstitutional after *Daimler AG v. Bauman*); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1380 (2015) (arguing that registration amounts to coerced consent and accordingly is not a legitimate basis of jurisdiction); Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 4 (1990) (arguing that the Supreme Court's broadened analysis after *International Shoe* makes it no longer permissible to view registration as a sufficient basis for exercising jurisdiction over a cause of action arising outside the state; consequently, when the Court expanded its approach by including an examination of the relationship between the litigation and the forum, the use of registration statutes to confer jurisdiction over a defendant for a cause of action arising outside the state became obsolete); D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 3 (1990) (arguing that treating a corporation's appointment of an agent for service or process as a basis for general jurisdiction imposes an unconstitutional condition on a foreign corporation's ability to transact business in the state); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1163 (2003) (arguing that while the Due Process Clause does not prohibit the assertion of general jurisdiction based on registration, the unpredictability that registration statutes produce "invalidates the consent theory upon which . . . personal jurisdiction is premised"). For cases, see *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016) ("[I]n the absence of a clear legislative statement and a definitive interpretation by the Connecticut Supreme Court and in light of constitutional concerns, we construe Connecticut's registration statute and appointment of agent provisions not to require registrant corporations that have appointed agents for service of process to submit to the general jurisdiction of Connecticut courts."); *Genuine Parts Co. v. Cepec*, 137 A.3d 123,

For many years, however, U.S. courts recognized the validity of “doing business” jurisdiction.¹⁴³ That is, if a corporation engaged in a significant amount of business in a forum—and thereby had continuous and systematic general business contacts with that forum—then the corporation would be subject to general jurisdiction there.¹⁴⁴ As discussed, general jurisdiction enables a court to take jurisdiction over any and all claims against a defendant, even if the claim is unrelated to the defendant’s contacts with the forum.¹⁴⁵ For instance, if ABC Corporation was doing business in New York, then a court would be able to assume jurisdiction over ABC Corporation even if the cause of action arose in Connecticut and had absolutely nothing to do with New York. The theory was that if a corporation maintained strong ties with a forum, such that it was availing itself of the privilege of conducting business there, then it was fair and reasonable to subject that corporation to personal jurisdiction in the forum with respect to any and all causes of action. Otherwise stated, because the corporation maintained a strong commercial presence in the forum, it would be subject to general jurisdiction there.

127 (Del. 2016) (explaining that corporate registration statute governing service of process on foreign corporations requires a foreign corporation to allow service of process to be made upon it in a convenient way in proper cases, but statute is not a consent to general jurisdiction). It is important to emphasize, however, that general jurisdiction based on registration (to the extent that it is constitutional) is a form of consent-based jurisdiction, not presence-based jurisdiction. Accordingly, it is not quite comparable to the form of tag jurisdiction articulated in *Chevron*. In *Chevron*, it is the combination of the defendant corporation’s presence in the province, along with service of process, that grounds jurisdiction. With registration, it is the consensual act of registration, combined with service of process, that grounds jurisdiction.

143. *Genuine Parts Co.*, 137 A.3d at 129–30 (“Until recently, a foreign corporation could be subject to general jurisdiction if it had ‘continuous and systematic’ business contacts in the forum state. That is, merely doing business in a state was a basis for general jurisdiction there.”).

144. The idea of continuous and systematic contacts grounding general jurisdiction was referenced in the leading case on specific jurisdiction, *International Shoe*. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (“[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”).

145. General jurisdiction is sometimes referred to as “all-purpose” jurisdiction or “dispute-blind.” See, e.g., *Daimler*, 134 S. Ct. at 749 (referring to general jurisdiction as “all-purpose” jurisdiction); *Walden v. Fiore*, 134 S. Ct. 1115, 1121 n.6 (2014) (same); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (same); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 897 (2011) (same); *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 339 (5th Cir. 1999) (referring to general jurisdiction as dispute blind); *Tom’s of Me. v. Acme-Hardesty Co.*, 565 F. Supp. 2d 171, 175 (D. Me. 2008) (same); *PPD Ship, L.L.C. v. Enos*, No. Civ.A.03-0976, 2003 WL 22038517, at *4 (E.D. La. Aug. 28, 2003) (same).

For decades, courts in the United States accepted the legitimacy of doing business jurisdiction,¹⁴⁶ but all of that changed with the U.S. Supreme Court's landmark decision in *Daimler v. Bauman*.¹⁴⁷ In *Daimler*, the Court held that a corporation is only subject to general jurisdiction if the corporation has continuous and systematic general business contacts with a forum, *such that it can fairly be regarded as "at home" there*.¹⁴⁸ Justice Ginsburg, writing for eight members of the

146. See generally *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Note that commentators had long questioned the legitimacy of doing business jurisdiction. For example, Professor Erichson starts off an article with the following statement:

What, if anything, gives a state sufficiently plenary power over a person that the state may adjudicate claims against the person even if the claims arose elsewhere? Particularly with regard to corporations, this basic question has lacked a clear answer. The standard for general jurisdiction remains unsatisfactorily vague, with ambiguous Supreme Court guidance on doctrine and even less explanation of *why* such jurisdiction exists.

Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 81–82 (2013) (emphasis in original).

147. *Daimler*, 134 S. Ct. 746.

148. Note that the "at home" language had been introduced into the jurisdictional discourse a couple of years earlier in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). In *Goodyear*, North Carolina plaintiffs sued tire manufacturer Goodyear USA and several of its foreign subsidiaries in North Carolina, stemming from an accident that took place in France. Goodyear's subsidiaries, based in Turkey, France, and Luxembourg, challenged the jurisdiction of the North Carolina court. Justice Ginsburg, writing for the plurality, concluded that the defendants' "attenuated connections to the State [fell] far short of the 'the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." *Id.* at 929. She noted that the paradigm bases for general jurisdiction over a corporation are its state of incorporation and the state of its principal place of business. *Id.* at 923–24. In addition, she stated that a court could assert general jurisdiction over a corporation where the corporation's affiliations with a state were "so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* at 916. On the facts of *Goodyear*, Justice Ginsburg readily concluded that the foreign defendants were "in no sense at home in North Carolina." Following *Goodyear*, there was some confusion over the meaning of the Court's new "at home" language. See, e.g., Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 677 (2012) ("The Court did not specify what it meant by at home, or address how many states could qualify with respect to a particular corporation—a question that is sure to be litigated in future cases. However, the *Goodyear* opinion did include several clues suggesting that the Court may have intended the at home standard as a narrow one, perhaps extending no further than a corporation's state of incorporation and principal place of business."); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 214–15, 217 (2011) ("Thus, Justice Ginsburg suggests that, under the specific facts of *Goodyear*, the plaintiff's theory of personal jurisdiction reaches far beyond existing precedent, but she does not explicitly suggest that she intends to go further than this case requires and reverse the multitude of lower court cases that rest general jurisdiction on direct sales to the forum state. That result would be vastly more far reaching than what the decision in *Goodyear* requires and would work a major change in lower court caselaw without consideration of the very different facts of those cases.").

Court, made it clear that a corporation is ordinarily only at home in two places: its state of incorporation and the state of its principal place of business. It would be a rare case where a corporation is at home anywhere else. The Court in *Daimler* outright rejected the idea that significant corporate presence in a forum (short of being at home there) could suffice to ground general jurisdiction over a corporation. *Daimler* represented a paradigm shift in the law of general jurisdiction, overturning over fifty years of precedent.¹⁴⁹

It is important, however, to distinguish doing business jurisdiction that existed prior to *Daimler* from the presence-based jurisdiction that the Supreme Court of Canada has recognized in *Chevron*. In *Chevron*, the Court indicated that, as long as a corporation is carrying on business in the province and can physically be served there, it is subject to general jurisdiction in the province. As the law existed prior to *Daimler*, on the other hand, U.S. courts required that a corporation have continuous and systematic general business contacts with the forum in order to ground general jurisdiction. In-state service was also not a prerequisite to asserting jurisdiction under the theory of doing business jurisdiction.

The critical difference between the two is that the threshold of connection between the forum and the corporate defendant is much lower under the Canadian test than it ever was in the United States. While the tests may sound alike (carrying on business and doing business), they are not the same. Carrying on business requires a fairly minimal degree of connection with the forum. As the *Chevron* case itself demonstrates, a physical office in Ontario, along with a handful of employees working there, suffices to meet the standard of carrying on business. By contrast, doing business in the United States was a fairly high standard, even before *Daimler*, requiring a showing that the corporation engaged in continuous and systematic business activities in the forum.¹⁵⁰ If a corporation had a physical office in a state, and a

149. See generally Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 105–06 (2015) (“*Daimler* is a game changer. In advancing the policy goal of giving corporations the power to limit states where they must answer legal claims, the Court shrinks the places of general jurisdiction against many large corporations to one or two states.”); Tanya J. Monestier, *Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 265 (2014) (“The message in *Daimler* has come through loud and clear: doing business jurisdiction is a dead letter.”); Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 228 (2014) (“*Bauman* is likely to be the more disruptive case, however. . . . *Bauman* now gives such corporations a ground to contest jurisdiction outside of their home states, but in doing so it creates a fertile ground for jurisdictional litigation.”).

150. See, e.g., *Johnston v. Multidata Sys. Int’l Corp.*, 523 F.3d 602, 611 (5th Cir. 2008) (“This circuit has consistently imposed the high standard set by the Supreme Court when ruling on general jurisdiction issues.”); *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078 (9th Cir. 2003), *vacated, en banc*, 398 F.3d 1125 (9th Cir. 2005) (referring to

couple of employees who reported to work there, that would most likely not have been enough to constitute doing business for the purpose of the U.S. jurisdictional test.¹⁵¹

What is important, however, is that the U.S. Supreme Court in *Daimler* considered even this doing business standard—which is stricter than the carrying on business standard—to be “unacceptably grasping.”¹⁵² Accordingly, it dramatically reined in the test for general jurisdiction over corporations. Now, in order for a corporation to be subject to general jurisdiction outside its state of incorporation or the state of its principal place of business, the corporation has to have such significant contacts with that state that it can be considered at home there.¹⁵³ The gulf between the law as it exists in Canada and as it exists in the United States is enormous.

The rationales underpinning the U.S. Supreme Court’s decision in *Daimler* are worth examining since they also apply to the Supreme Court of Canada’s decision in *Chevron*. First, the U.S. Supreme Court noted that an expansive interpretation of general jurisdiction poses risks to international comity.¹⁵⁴ The Court observed that “[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”¹⁵⁵ For instance, the Court pointed to the fact that, under the Brussels Regulation,¹⁵⁶ which governs jurisdiction and the enforcement of judgments in the European Union, a corporation may generally be sued in the nation in which it is “‘domiciled,’ a term defined to refer only to the location of the corporation’s ‘statutory seat,’ ‘central administration,’ or ‘principal place of business.’”¹⁵⁷ Furthermore, the Court noted that unpredictable assertions of general jurisdiction over U.S. subsidiaries of foreign

the “high standard the Ninth Circuit has set” and noting that “the presence of general jurisdiction in the instant case is a close question.”).

151. See, e.g., *Cossaboon v. Maine Medical Ctr.*, 600 F.3d 25, 33–36, 39 (1st Cir. 2010) (holding that defendant hospital did not establish continuous and systematic contacts in New Hampshire even though it registered to do business and employed one person in the state, advertised to residents of the state, and operated a website accessible in the state.); *Riemer v. KSL Recreation Corp.*, 348 Ill. App. 3d 26, 40–41, 807 N.E.2d 1004, 1016–17 (2004) (explaining that the presence of an individual employee and a website accessible in Illinois were not sufficient contacts to rise to the level of “doing business.”); *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 13, 29–30 (D.D.C. 2014) (holding that the defendant corporation’s meetings, negotiations, website, tax filings, and even meetings between company executives and clients in the forum state were not sufficient to constitute doing business).

152. *Daimler*, 134 S. Ct. at 761.

153. In the years since *Daimler* was decided, courts have interpreted this “at home” basis for general jurisdiction extremely narrowly.

154. *Daimler*, 134 S. Ct. at 763.

155. *Id.*

156. Brussels I Regulation (Recast), Council Regulation (EU) No. 1215/2012, art. 4, O.J. L. 351/1 (2012).

157. *Daimler*, 134 S. Ct. at 763.

corporations could discourage foreign investment.¹⁵⁸ As it stands now, Canada appears to be an outlier when it comes to corporations and presence-based jurisdiction. Foreign corporations may be concerned that they will be subject to general jurisdiction in a Canadian province even though they have very little commercial presence there. This may lead corporations to structure their affairs differently, or to avoid engaging in business in Canada altogether.

Second, the U.S. Supreme Court in *Daimler* expressed concern that jurisdiction based on a corporation doing business in a forum would lead to unpredictable results for defendants.¹⁵⁹ A corporate defendant would never know with certainty whether its conduct met the threshold necessary to constitute continuous and systematic general business contacts.¹⁶⁰ This is also a concern now in Canada. The Supreme Court of Canada in *Chevron* held that a corporation is subject to jurisdiction if it carries on business in the province and is served with process there.¹⁶¹ While carrying on business definitively requires a lower quantum of connection than doing business, it is still unknown exactly what constitutes carrying on business. Accordingly, corporations in Canada may not know whether their minor presence in a province would be sufficient to ground jurisdiction if they are physically served in the province. Certainly, *Chevron* Canada itself did not realize that being served with process at a remote satellite location with a handful of workers would be enough to subject it to jurisdiction in Ontario.

Finally, the U.S. Supreme Court in *Daimler* was concerned that broad assertions of general jurisdiction would encourage forum shopping.¹⁶² The Court expressed reservations about U.S. courts being open for business to out-of-state or out-of-country plaintiffs whose cause of action has nothing to do with the defendant's connections to the forum.¹⁶³ To allow assertions of general jurisdiction because the

158. *Id.* (citing Brief for the Respondents at 35; Brief for the United States as Amicus Curiae Supporting Petitioner at 2).

159. *Id.*

160. *See id.* at 761–62 (“If *Daimler*’s California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA’s sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants ‘to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’”) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

161. *Chevron*, 3 S.C.R. at para. 94.

162. *See Daimler*, 134 S. Ct. at 757.

163. The Court referenced an example of such impermissible forum shopping. *See Daimler*, 134 S. Ct. at 751 (“[I]f a *Daimler*-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties [under plaintiff’s theory] could maintain a design defect suit in California. Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.”) (citations omitted).

defendant is carrying on business in the forum certainly promotes forum shopping. If plaintiffs can find a forum where the defendant is carrying on business, they can sue there over something that happened elsewhere and benefit from the application of the selected forum's procedural (and perhaps substantive) law.¹⁶⁴ This forum shopping is exactly what happened in *Chevron* itself. Chevron Canada has little to no connection with Ontario: its head office is in Alberta and its registered office is in British Columbia. However, in order to have the action proceed against both Chevron and Chevron Canada in a singular forum, and perhaps for other strategic reasons, the plaintiffs chose to initiate the action in Ontario. The *Chevron* case is simply an enforcement action; one would imagine that the potential for forum shopping would be much more acute at first instance.

The disconnect between presence-based jurisdiction over corporations in Canada and corporations in the United States could not be greater. While U.S. courts are curbing broad assertions of jurisdiction over corporations, Canadian courts are doing the opposite. For years, commentators have lamented broad exercises of jurisdiction by U.S. courts, noting that the United States was an outlier in its approach to jurisdiction.¹⁶⁵ If the United States was an outlier then, what is Canada now? Canada's approach to jurisdiction over corporations is far more radical than the U.S. approach ever was.

VI. CONCLUSION

When the *Chevron* case was released, most looked to the precedent it would set for the recognition and enforcement of judgments and/or the law of corporate personality. This Article suggests, however, that the biggest implication of the Supreme Court of Canada's decision in *Chevron* might be what it said about presence-based jurisdiction over corporations. The Court in *Chevron* held that tag jurisdiction for corporations was perfectly appropriate—indeed, that it was a longstanding and traditional basis for jurisdiction. As long as a corporation is carrying on business and can physically be served with process in a province, then it will be subject to jurisdiction there. The provincial court will have general jurisdiction over the corporation, meaning that the corporation can be held to account in the province for any and all wrongs, wherever committed.

The Supreme Court of Canada provided rather flimsy support for the proposition that the practice of asserting presence-based jurisdiction was well-established. In fact, in the leading case cited for presence-based jurisdiction, *Incorporated Broadcasters*, the Ontario Court of Appeal

164. See *Ferens v. John Deere*, 494 U.S. 516, 524 (1990).

165. See, e.g., Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 95–96 (1999) (“The Europeans’ principal objection to U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts.”).

appeared not to understand what presence-based jurisdiction was. Regardless of whether there is support for presence-based jurisdiction in the case law, the more important question is whether tag jurisdiction over corporations is a good idea. This Article has identified numerous problems with asserting presence-based jurisdiction over corporations. Foremost among these problems is the concern about creating universal jurisdiction over corporations without an adequate conceptual framework or justification. Additionally, presence-based jurisdiction does not align well with the *Van Breda* framework for assumed jurisdiction. In particular, the presumptive connecting factor of “carrying on business” is now largely superfluous under the *Van Breda* test; if a corporation is carrying on business, it should simply be served *in juris* under a presence-based jurisdiction theory, rather than *ex juris* under the real and substantial connection test.

As the discussion of U.S. law demonstrates, presence-based jurisdiction over corporations is not really needed. There are plenty of ways for a court to assume jurisdiction over a corporation (specifically, at its place of domicile and where it carries on business under the *Van Breda* framework). To open jurisdiction up more broadly will simply invite forum shopping and result in unfair assertions of jurisdiction with respect to corporations that have a minimal connection to the forum.

For now, the precedent in *Chevron* stands. Corporations in Canada are subject to tag jurisdiction—jurisdiction based on a corporation being served in any province where it is carrying on business. How this development will play out over the long-term remains to be seen. However, if the consequences are as predicted in this Article, it may be that the Supreme Court of Canada decides to revisit this decision sooner rather than later.