



# Newsletter



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### ***MUSCUTT* TEST CLARIFIED: JURISDICTION OVER OUT OF PROVINCE DEFENDANTS**

In its recently released decision in *Van Breda v. Village Resorts Limited (Van Breda)*, 2010 ONCA 84, the Ontario Court of Appeal has provided a clarification to the “real and substantial connection” test to be applied in determining whether Ontario courts should assume jurisdiction over out-of-province defendants.

The two matters, in which jurisdiction arose, involved two claims for personal injury damages occasioned as a result of accidents suffered by Canadian tourists at resorts in Cuba. In both matters, the motion judges found that Ontario should assume jurisdiction against the out-of-province defendants, the owners and operators of the resorts.

When the two cases were first argued, the appellants did not challenge the test for assumed jurisdiction laid down by the Court of Appeal for Ontario in a group of cases known as the “*Muscutt* quintet”: *Muscutt v. Courcelles* 2002 CanLII 44957 (ON C.A.), (2002), 60 O.R. (3d) 20 (C.A.); *Leufkens v. Alba Tours International Inc.*(2002), 60 O.R. (3d) 84 (C.A.); *Lemmex v. Bernard*, (2002), 60 O.R. (3d) 54 (C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76 (C.A.); *Gajraj v. DeBernardo* 2002 CanLII 44959 (ON C.A.), (2002), 60 O.R. (3d) 68 (C.A.). The court subsequently directed that a five judge panel be established to permit a reconsideration of the *Muscutt* test.

#### **The *Muscutt* Test**

The existing multi-factor test was established by the Ontario Court of Appeal in a group of cases known as the “*Muscutt* quintet” in 2002. The *Muscutt* test requires the Court to weigh eight factors to determine whether there is a real and substantial connection to Ontario, including:

1. The connection between the forum and plaintiff’s claim;
2. The connection between the forum and defendant;

## FIRM AND INDUSTRY NEWS

- **Kim Stoll** is the new Treasurer of the Canadian Transport Lawyers Association. Kim was previously the Ontario director.
- **Gordon Hearn** represented the firm at the Conference of Freight Counsel held January 10 and 11 in Austin, Texas and at the Transportation Lawyers Association Regional Seminar held January 21 and 22 in Chicago, Illinois.
- **Rui Fernandes** will be presenting a paper on April 23<sup>rd</sup> 2010 at the Canadian Institute's Conference on Managing Risks in Maritime Carriage of Goods Contracts.
- Release 2009 – 2 for Transportation Law (by **Rui Fernandes**) is now available from Aerospark Press ([www.aerosparkpress.com](http://www.aerosparkpress.com)).
- May 26<sup>th</sup> and 27<sup>th</sup> 2010 – Canadian Board of Marine Underwriters Semi - Annual Meeting will take place in Montreal Canada.



3. Unfairness to the defendant in assuming jurisdiction;
4. Unfairness to the plaintiff in *not* assuming jurisdiction;
5. The involvement of other parties to the suit;
6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7. Whether the case is interprovincial or international in nature; and
8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

The Court of Appeal provided a good review of the existing case law:

The *Muscutt* quintet all dealt with claims for damages sustained in Ontario as a result of torts committed outside the province. *Muscutt* reflected an attempt to guide the courts in determining when jurisdiction should be assumed against an extra-provincial defendant in such cases, in light of the significant changes brought about by *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, and a series of seminal judgments that rewrote the law of jurisdiction and enforcement of judgments.

*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Hunt* laid down, for the first time, a common law test for assumed jurisdiction and enforcement of foreign judgments based on the idea of "real and substantial connection" and respect for the principles of "order and fairness". The reach of provincial jurisdiction against extra-provincial defendants was limited to cases that met the "real and substantial connection" test, and also required the courts of one province

to recognize and enforce judgments of another province where the jurisdiction asserted by that other province satisfied the real and substantial connection test. In *Beals v. Saldhana*, [2003] 3 S.C.R. 416, the Supreme Court held that the real and substantial connection test also applied to the recognition and enforcement of foreign judgments. *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, overruled the long-standing choice of law for tort cases that gave the law of the forum prominence, and introduced the rule that tort cases are to be decided on the basis of the law of the place where the tort was committed. *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, elaborated the doctrine of *forum non conveniens*, the discretionary power of the courts to decline to exercise jurisdiction where the case is more appropriately dealt with in another jurisdiction.

The Court of Appeal recognized that "Since *Muscutt* was decided seven years ago, there have been a number of developments that make it appropriate for us to consider whether the test we adopted then should now be retained, modified, simplified or abandoned in favour of a different approach."

### The Court of Appeal Decision

In *Van Breda*, the Court of Appeal observed that the substantial body of jurisprudence which has developed subsequent to *Muscutt* suggests that the existing test was too discretionary and inconsistently applied. *Muscutt* provided little guidance on the relationship between the eight factors or the



relative weight or significance each factor should bear.

In *Van Breda*, the Court of Appeal modified the *Muscutt* test by instituting a preliminary step to determine whether a real and substantial connection is presumed to exist. Second, the Court clarified the role and weight to be ascribed to each factor. It reaffirmed that:

“The core of the real and substantial connection test is the connection that the plaintiff’s claim has to the forum and the connection of the defendant to the forum, respectively. The remaining considerations or principles serve as analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the defendant.”

*Step One: A Category Based Presumption*

In determining whether it has jurisdiction, a court must now first consider whether the factors used to determine whether a defendant may be served outside the province without leave under rule 17.02 of the Ontario *Rules of Civil Procedure* are present. This determination will frame the second stage of the test and establish which party bears the burden of proving the existence of a “real and substantial connection.”

Some of the most commonly relied-upon connecting factors for the purposes of Rule 17.02 include: a contract that was made in Ontario; the existence of governing law provisions designating the law of Ontario; a tort committed in the Province; damages sustained in the Province; and the fact that the defendant is a necessary or proper party to a claim properly brought against other parties in the Province.

The Court of Appeal held that when one of the enumerated factors under Rule 17.02 is

made out, with the exception of damage sustained in the province, or the defendant being a “necessary or proper” party to proceedings brought properly against other parties in the Province, jurisdiction is presumed – it is presumed that there exists a real and substantial connection to Ontario. The defendant then bears the burden of showing that a real and substantial connection does not exist. If one of these connections is not made out, the burden falls on the plaintiff to demonstrate that the real and substantial connection test is met.

This is significant for two reasons. First, the burden of proof has, to date, been largely undefined in case law and this method provides substantial clarification. Second, the Court of Appeal has recognized that the mere fact that the plaintiff sustained damages in Ontario will not generally serve as a reliable indicator of a real and substantial connection. Nor will the fact that litigation is legitimately pursued against other parties in the Province. It is now clear that, although these two factors may form the basis for assumed jurisdiction in some instances, they are to be accorded less weight than the other factors enumerated under Rule 17.02 and are not, in themselves, sufficient to shift the burden of proof to the defendant.

#### *Step Two: The Factors to Establish a Real & Substantial Connection*

At the second stage, the question before the court is whether there is a real and substantial connection between Ontario and the plaintiff’s claim and the defendant, respectively.

The Court of Appeal has tried to simplify and refine the *Muscutt* test.

Factors:

#### 1. *The core of the test: the connection between the forum, the plaintiff’s claim and the defendant*

When assessing the connection between the forum and the defendant, the primary focus is on things done by the defendant within the jurisdiction. Where the defendant confines its activities to its home jurisdiction, it will not ordinarily be subject to the jurisdiction of the forum: see e.g. *Lemmex*, *Leufkins* and *Sinclair*. However, as was held in *Moran*, physical presence or activity within the jurisdiction is not always required. Where a defendant could reasonably foresee that its conduct would cause harm within the forum by putting a product into the normal channels of trade and knows, or ought to know, that the product would be used in the forum and that if defective could harm a consumer in the forum, jurisdiction may be assumed.

#### 2. *Fairness*

The Court of Appeal maintained the consideration of the fairness of assuming or refusing jurisdiction as a consideration that bears upon the real and substantial connection test. The Court of Appeal collapsed factors 3 and 4 (above) into one. The Court also stated that fairness should not be seen as a separate inquiry unrelated to the core of the test, the connection to the forum. In other words, the Court reduced the importance of fairness.

#### 3. *The relevance of the involvement of other parties to the suit*

The involvement of other parties to the suit is not, as *Muscutt* suggests, a factor that needs to be routinely considered in all cases. It remains relevant to the real and substantial connection test, but only in cases where it is asserted as a possible (not a presumptive) connecting factor that may justify assuming jurisdiction.

4. *The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis.*

The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis should not be treated as a separate factor to be considered and weighed in the balance with the other relevant factors. It remains, however, a general and overarching principle that emerges from the assimilation in *Morguard* and *Hunt* of the rules for jurisdiction over foreign defendants and the rules for recognition and enforcement of foreign judgments. If a court holds that there is a real and substantial connection sufficient to justify asserting jurisdiction against a foreign defendant, it thereby holds that there would be a real and substantial connection sufficient to require recognition and enforcement of a foreign judgment against an Ontario defendant rendered on the same basis. That is an important general legal principle that disciplines the assumption of jurisdiction against extra-provincial defendants. It is a principle that a court should bear in mind when considering whether to assume jurisdiction against an extra-provincial defendant. If the court would not be prepared to recognize

and enforce an extra-provincial judgment against an Ontario defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against the extra-provincial defendant.

5. *Whether the case is interprovincial or international in nature*

It is not useful to treat the difference between international and interprovincial judgments as one of several items on a multi-factor list having more or less equal weight with the other factors. Rather, it should be regarded a general principle of law that generally shapes and guides the analysis of real and substantial connection.

6. *Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere*

I would no longer list comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere as one of several items on a multi-factor list having more or less equal weight with the other factors, I would maintain these legal principles as relevant to the assessment of real and substantial connection.

Although the Court of Appeal confirmed that, where the defendant has confined its activities to its home jurisdiction, it will not ordinarily be subject to the jurisdiction of the Ontario courts, the Court did note that physical presence or activity is not always required to establish a real and substantial

connection to Ontario--for instance, when a defendant may reasonably foresee that its conduct would cause harm within the forum by putting a product into the normal channels of trade, jurisdiction may be assumed.

However, the Court of Appeal was careful to constrain the potential for foreseeability of harm within the province to establish jurisdiction over defendants who otherwise have no meaningful connection to the Province. It rejected, as overly broad, the respondents' argument that jurisdiction should be assumed over a defendant who ought to reasonably have contemplated being called into account within the forum. As observed by Justice Sharpe, writing for the unanimous panel: "It is difficult to see how a proposition stated that broadly could avoid subjecting anyone who has regular dealings with extra-provincial parties from rendering themselves subject to the home jurisdiction of the extra-provincial customer."

### Summary

The Court summarized the reformulated *Muscutt* test as:

- First, the court should determine whether the claim falls under rule 17.02 (excepting subrules (h) and (o)) to determine whether a real and substantial connection with Ontario is presumed to exist. The presence or absence of a presumption will frame the second stage of the analysis. If one of the connections identified in rule 17.02 (excepting subrules (h) and (o)) is made out, the defendant bears the burden of showing that a real and substantial connection does not exist. If one of those connections is not made out, the burden falls on the plaintiff to demonstrate that, in the

particular circumstances of the case, the real and substantial connection test is met.

- At the second stage, the core of the analysis rests upon the connection between Ontario and the plaintiff's claim and the defendant, respectively.

- The remaining considerations should not be treated as independent factors having more or less equal weight when determining whether there is a real and substantial connection but as general legal principles that bear upon the analysis.

- Consideration of the fairness of assuming or refusing jurisdiction is a necessary tool in assessing the strengths of the connections between the forum and the plaintiff's claim and the defendant. However, fairness is not a free-standing factor capable of trumping weak connections, subject only to the forum of necessity exception.

- Consideration of *jurisdiction simpliciter* and the real and substantial connection test should not anticipate, incorporate or replicate consideration of the matters that pertain to *forum non conveniens* test.

- The involvement of other parties to the suit is only relevant in cases where that is asserted as a possible connecting factor and in relation to avoiding a multiplicity of proceedings under *forum non conveniens*.

- The willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis is as an overarching principle that disciplines the exercise of jurisdiction against extra-provincial defendants. This principle provides perspective and is intended to prevent a judicial tendency to overreach to assume jurisdiction when the plaintiff is an Ontario resident. If the court would not be prepared to recognize and enforce an extra-provincial judgment against an Ontario defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against the extra-provincial defendant.

- Whether the case is interprovincial or international in nature, and comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere are relevant considerations, not as independent factors having more or less equal weight with the others, but as general principles of private international law that bear upon the interpretation and application of the real and substantial connection test.

- The factors to be considered for *jurisdiction simpliciter* are different and distinct from those to be considered for *forum non conveniens*. The *forum non conveniens* factors have no bearing on real and substantial connection and, therefore, should only be considered after it has been determined that there is a real and substantial connection and that jurisdiction *simpliciter* has been established.

- Where there is no other forum in which the plaintiff can reasonably

seek relief, there is a residual discretion to assume jurisdiction.

### **Distinction Between the Tests for Jurisdiction and *Forum non Conveniens***

The Court of Appeal expressed disapproval of a recent tendency of Ontario judges to incorporate considerations from the *forum non conveniens* test into the real and substantial connection test. It blamed this tendency, in part, on an unduly wide interpretation given to fairness in some cases, and emphasized the importance of maintaining a rigorous distinction between the two tests.

In particular, the Court of Appeal distinguished the tests on the basis that the test for jurisdiction (often referred to as *jurisdiction simpliciter*) is a non-discretionary determination as to whether a jurisdiction exists. The test for *forum non conveniens*, is a discretionary determination that compares the relative strength of the connection with another potentially available jurisdiction. The Court confirmed that considerations that weigh the relative advantages or disadvantages of litigation in another forum have no place in the *jurisdiction simpliciter* analysis.

### **Summary**

It will be interesting to see if the fine line distinctions outlined by the Court of Appeal will in fact be applied by Ontario Courts and if it results in a consistency and predictability in the approach of our courts to questions of jurisdiction and *forum non conveniens*. Or will judges continue to rely on the “fairness” consideration as a way to determine jurisdiction? Time will tell.

Rui Fernandes

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## AND FINALLY,

### AN ATHEIST IN THE WOODS

An atheist was walking through the woods.

'What majestic trees!

'What powerful rivers!

'What beautiful animals!

He said to himself.

As he was walking alongside the river, he heard a rustling in the bushes behind him.

He turned to look. He saw a 7-foot grizzly bear charge towards him.

He ran as fast as he could up the path. He looked over his shoulder and saw that the bear was closing in on him.

He looked over his shoulder again and the bear was even closer.

He tripped and fell on the ground.

He rolled over to pick himself up but saw that the bear was right on top of him, reaching for him with his left paw and raising his right paw to strike him...

At that instant the Atheist cried out, 'Oh my God!'

Time Stopped.

The bear froze.

The forest was silent.

As a bright light shone upon the man, a voice came out of the sky.

'You deny my existence for all these years, teach others I don't exist and even credit creation to cosmic accident.'  
'Do you expect me to help you out of this predicament?  
Am I to count you as a believer?'

The atheist looked directly into the light, 'It would be hypocritical of me to suddenly ask you to treat me as a Christian now, but perhaps you could make the BEAR a Christian?'

'Very well,' said the voice.

The light went out. The sounds of the forest resumed. And the bear dropped his right paw, brought both paws together, bowed his head and spoke:

'For what I am about to receive, may the Lord make me truly thankful, Amen.'