# "After the Storm: The Impact of the Financial Crisis on Private International Law": Jurisdiction

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In her 2010 Rand Lecture, Catherine Walsh drew attention to the impact of the world financial crisis on individual autonomy and choice of law in contract, particularly in relation to contracts of adhesion in the contexts of consumer and insurance law.[1] Choice of law is one of the three principal concerns of private international law or conflict of laws; the other two are jurisdiction *simpliciter*[2] and recognition and enforcement of foreign judgments.[3] In times of financial instability and a global economic downturn, greater certainty in jurisdictional matters promotes efficiencies in the legal system and significant cost-savings for litigants, particularly if enhanced by confidence that the eventual judgment will be recognized and enforced, if need be, elsewhere. Differently expressed, transaction costs for litigants are reduced by greater certainty on issues of jurisdiction. Litigation on issues of jurisdiction are essentially wasted judicial and litigant resources on the path to eventual adjudication on the substantive merits of the legal dispute, though litigation of jurisdictional issues may lead to settlement.

This modest contribution to the collection of opinion pieces on private international law focuses on the jurisdictional questions that have so occupied Canadian jurists since the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*.[4] Along the way, the Court of Appeal for Ontario took what it now acknowledges as a misstep in *Muscutt v. Courcelles*,[5] a widely referenced and influential decision in some Canadian courts but resisted by others. In 2010, the

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1 Catherine Walsh, "After the Storm: The Impact of the Financial Crisis on Private International Law" elsewhere in this volume. The title of this forum contribution is offered as an homage to the Rand Lecturer with apologies for using a modified version of her title.

2 Also known as local sense jurisdiction, jurisdiction to adjudicate, or direct jurisdiction.

3 Also known as international sense jurisdiction or indirect jurisdiction.

4 [1990] 3 S.C.R. 1077.

5 (2002), 60 O.R. (3d) 20.

Court of Appeal for Ontario in *Van Breda v. Village Resorts Ltd.* revisited its approach to jurisdiction *simpliciter* in *Muscutt* but has it achieved a satisfactory result?[6]

That is the subject of this contribution.

## *MORGUARD* AND THE "REAL AND SUBSTANTIAL CONNECTION"

The Supreme Court of Canada's decision in *Morguard*, per La Forest J., established the "real and substantial connection" standard for the exercise of jurisdiction *simpliciter* by Canadian common law courts and linked that standard with the concept of "full faith and credit," which the Court found to be inherent in a federal state. Thus, jurisdiction *simpliciter* and international sense jurisdiction became mirrored, in that existence of a real and substantial connection justified the exercise of jurisdiction *simpliciter* to adjudicate a matter and grounded jurisdiction to support full faith and credit recognition and enforcement of the resulting judgment in another province or territory of Canada. The scope of jurisdiction *simpliciter* was limited by the "principles of order and fairness...[which] must underlie a modern system of private international law."[7] La Forest J. addressed application of the fairness principle rather bluntly: "fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction." As to the proper restraint, he identified the real and substantial connection standard supplemented by *forum non conveniens* (FNC).[8]

La Forest J. did not define "real and substantial connection" in *Morguard*, preferring that it develop on a case-by-case basis. He was also imprecise about the nature of the requisite connection–was it between the forum and the parties, the forum and the cause of action, or both? La Forest J. variously referred to "a connection 'between the subject-matter of the action and the territory where the action is brought,' 'between the jurisdiction and the wrongdoing,' 'between the damages suffered and the jurisdiction,' 'between the defendant and the forum province,' 'with the transaction or the parties,' and 'with the action.'"[9] Though inconsistent with phrases to describe the content of a real and substantial connection, La Forest J. was decidedly clear that the real and substantial connection standard was satisfied by the traditional bases of jurisdiction *simpliciter* grounded on territorial jurisdiction over a defendant present

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[6] 2010 ONCA 84 (CanLII).

[7] *Supra* note 4 at 1097. La Forest J. identified the purpose of a system of conflict of laws with "the flow of wealth, skills and people across state lines in a fair and orderly manner" and stressed the underlying principles of "order and fairness" as informing a modern conflicts system.

[8] *Ibid.* at 1109-10. Though not argued on a constitutional basis in *Morguard* itself, the Court subsequently confirmed the constitutional status of its jurisdictional rule of real and substantial connection and of full faith and credit in *Hunt v. T &N plc*, [1993] 4 S.C.R. 289.

[9] As handily summarized by Sharpe J.A. in *supra* note 6 at para. 36.

within the forum, or who submitted to the exercise of that jurisdiction by a contractual agreement, or who attorned to the jurisdiction by taking procedural steps to defend the action.[10] For La Forest J. in *Morguard*, concern about the limits of a real and substantial connection related to service *ex juris*, that is, when a foreign defendant is served a notice of an action commenced in the forum and must either defend on the merits (or challenge the exercise of jurisdiction itself) or face possible recognition and enforcement of a default judgment.[11] In *Muscutt*, Sharpe J.A. used the label "assumed jurisdiction" for service *ex juris* and I shall do likewise.

*Morguard* itself presented the troubling service *ex juris* scenario. The defendant, De Savoye, had become mortgagor of lands in Alberta while a resident of Alberta. He later relocated to British Columbia and allowed the mortgages to fall into default. The mortgagee commenced proceedings in Alberta to foreclose on the mortgaged lands and claimed for the deficiency after the judicial sale. Though served notice of the Alberta proceedings by registered mail to his home in British Columbia, De Savoye did not defend the action in Alberta and a default judgment followed. Critically, he was not resident in Alberta when the Alberta proceedings began. Thus, the British Columbia rules governing recognition of foreign judgments, which reflected the common law international sense jurisdictional rules, were not

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[10] *Supra* note 4 at 1103-04. See also *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at 397 per Dickson J.: "Traditionally, the view has been held that jurisdiction in a personal action rests on physical power and the ability of the Court to enforce any judgment it may render."

[11] The *Common Law Procedure Act, 1852*, 15 & 16 Vict. c. 76 extended to the superior courts of common law at Westminster and in the Counties Palatine of Lancaster and Durham the service *ex juris* procedure developed in courts of admiralty. The Act, per section XVIII, permitted service *ex juris* upon a defendant British subject residing abroad in relation to "a Cause of Action, which arose within the Jurisdiction, or in respect of the Breach of a Contract made within the Jurisdiction." The obvious benefits of service *ex juris* resulted in the expansion of the list of grounds for such service as reflected in the modern Rules of Court.

Reform of provincial rules of court in the late 1970s and early 1980s addressed the common law problem for a defendant who unsuccessfully challenged the jurisdiction of the forum court (usually in combination with some alleged procedural defect) and then withdrew from further involvement in the proceedings only to be faced with an action to enforce the resulting default judgment. At common law, an appearance in foreign proceedings other than to protect property already seized was considered a voluntary appearance or attornment to the jurisdiction of the foreign court so that a resulting default judgment was enforceable. For example, consider *Harris v. Taylor*, [1915] 2 K.B. 580 and *Henry v. Geoprosco International Ltd.*, [1976] Q.B. 726. Modern rules of court now permit a defendant served *ex juris* to move to set aside service without being held to have submitted to the jurisdiction of the court. See for example *New Brunswick Rules of Court*, Rule 19.05 (N.B. Regulation 82-73 under the *Judicature Act*, R.S.N.B. c. J-2). For example, see also *Dovenmuehle Inc. v. Rocca Group* (1981), 34 N.B.R.(2d) 444 (CA); leave to appeal to the Supreme Court of Canada refused (1982), 43 N.B.R.(2d) 359 (SCC).

satisfied.[12] On appeal, the Supreme Court of Canada applied the real and substantial connection standard to the facts of the case. The mortgaged lands were in Alberta, the contractual relationship of the parties arising from the mortgages was created in Alberta by then-residents of Alberta, and the foreclosure proceedings that resulted in the deficiency and thus the deficiency action occurred in Alberta. As expressed by La Forest J., "[a] more 'real and substantial' connection between the damages suffered and the jurisdiction can scarcely be imagined."[13]

The phrase used by La Forest J. at that critical point in *Morguard* is telling, for it alludes to the foundational decision in *Moran v. Pyle National (Canada) Ltd.*,[14] the dangerous light bulb case, in which Dickson C.J.C. held for a unanimous Court that the "arbitrary and inflexible" theories to localize a tort in the place of acting or place of harm must give way to a more flexible real and substantial connection test in which a tort is considered "as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties." Dickson C.J.C. then held that a tort was committed in Saskatchewan when damage (death) was caused there by the ordinary use of a light bulb manufactured in Ontario that entered into the normal channels of trade to the knowledge or expectation of the manufacturer and arrived in Saskatchewan. Rules of civil procedure were then amended to include "damage sustained in [the province] arising from a tort or breach of contract wherever committed" as an alternative ground of service *ex juris* to the more traditional "in respect of a tort committed [in the province]."[15] Alberta did not adopt this amendment.

*Morguard* and *Moran v. Pyle* are informative because both involved a finding of a real and substantial connection when a plaintiff suffered damage in the forum due to the conduct of a defendant resident in another province of Canada. In both cases, the Court assessed that connection contextually, including consideration of the risk taken by the defendant that damage would occur in that country. To step back a bit, this approach is consistent with that of public international law on the jurisdiction of states. The territorial principle finds expression in the first two of Huber's three maxims (1689) which, though not expressly credited, can be read as informing the approach of La Forest J. in *Morguard*:

> 1st. The laws of every empire have force within the limits of that government, and are obligatory upon all who are within its bounds.
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> 2d. All persons within the limits of a government are considered as subjects, whether their residence is permanent or temporary.

[12] *Emanuel v. Symon*, [1908] 1 K.B. 302 per Buckley L.J.
[13] *Supra* note 4 at 1108.
[14] [1975] 1 S.C.R. 14393.
[15] *Supra* note 6 at para. 36 and *New Brunswick Rules of Court*, rules 19.01(i) and (h), respectively.

> 3d. By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens.[16]

In addition to jurisdiction over persons within its territory, the nationality principle permits a state to exercise jurisdiction over its nationals abroad. What the real and substantial connection standard, as applied in *Morguard* and *Moran v. Pyle*, really alludes to is the "effects test" for the exercise of state jurisdiction at public international law. If accepted for present purposes as a handy compendium of relevant principles, the *Restatement (3d) of the Foreign Relations Law of the United States*, article 421(2)(j), states that jurisdiction to adjudicate exists where: "the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity."[17] To those familiar with U.S. jurisprudence, this rule addresses what is known as specific jurisdiction, as opposed to the general jurisdiction associated with the territorial principle—and is a subject to which I will return later.

Returning to *Morguard*, the Uniform Law Conference of Canada took concrete action by adopting the *Uniform Court Jurisdiction and Proceedings Transfer Act* in 1994.[18] The Act was the product of an effort by the Alberta Commissioners in conjunction with Professor Joost Blom, who served as principal researcher. The ULCC Uniform Act defines "territorial competence" as

> the aspects of a court's jurisdiction that depend on a connection between:

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[16] Ulric Huber, *De Conflictu Legum* (1689) as translated in *Emory v. Greenough*, 3 U.S. 640, 3 Dallas 369 (1797). Though not attributed to Huber, the same concepts are found in *Compania Naviera Vascongado v. S.S. Cristina*, [1938] A.C. 485 at 496-97 (per Lord MacMillan):
It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits. This jurisdiction is exercised through the instrumentality of the duly constituted tribunals of the land. But just as individuals living in a community find it expedient to submit to some diminution of their freedom of action in favour of their fellow-citizens, so also the sovereign States which constitute the community of nations have been led by courtesy as well as by self-interest to waive in favour of each other certain of their sovereign rights. The extent of these mutual concessions and their recognition is primarily a matter of international, not of domestic law, and as must necessarily be the case with all international law, which has neither tribunals nor legislatures to define its principles with binding authority, there may be considerable divergence of view and practice among the nations.

[17] The American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States* (St. Paul, Mn.: The American Law Institute, 1987).

[18] Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting*, Charlottetown, P.E.I (August 1994).

> (a) the territory or legal system of the state in which the court is established; and
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> (b) a party to a proceeding in the court or the facts on which the proceeding is based.

The Act, in section 3, then declares that territorial competence exists when the traditional common law grounds of jurisdiction[19] are satisfied and when "(e) there is a real and substantial connection between [the province] and the facts on which the proceeding against that person is based." The ULCC's significant contribution is that the Act, in section 10, provides a list of connections between the facts and the forum which are *prima facie* presumed to constitute a real and substantial connection (this list reads like the familiar list found in rules of court governing service *ex juris*) and a defendant may seek to rebut the presumption by negating the existence of a real and substantial connection on the particular facts. If a fact pattern does not fit within the section 10 list, it is always open to a plaintiff to rely upon the general provision in section 3 to demonstrate the existence of a real and substantial connection on the facts of the particular case.

To make a long story short, then came *Muscutt*.

## THE CONTRIBUTION OF THE ONTARIO COURT OF APPEAL: *MUSCUTT V. COURCELLES*

In 2002, the Court of Appeal for Ontario released its version of a "real and substantial connection" for the purposes of establishing jurisdiction *simpliciter* in respect of "damage sustained in [the province] arising from a tort... wherever committed," that is, situations involving domestic plaintiffs injured through foreign causes of action and implicating foreign defendants. As will be seen, the strength of the *Muscutt v. Courcelles* approach lay not in the logic of its eight factors but in the concept of "full faith and credit" coupled with the nature of the insurance industry, particularly the statutory obligation to appear and defend litigation in Canadian courts.[20]

*Muscutt* arose from a traffic accident in Alberta involving two vehicles, both of which were owned and driven by Alberta residents. The passenger in one vehicle suffered a spinal injury which became the subject of the litigation for damages. That passenger had moved to Alberta from Ontario three weeks prior to the accident to

[19] The commentary to the ULCC Act states that the common law rules were modified to substitute ordinary residence at the time proceedings were commenced for jurisdiction *simpliciter* based on personal service within the territory alone, i.e., transient or temporary presence when served.

[20] *Supra* note 5.

work on a contract basis but, prior to the accident, had accepted a permanent position with the employer. So, for all intents and purposes, this was a purely domestic action; that is, an Alberta plaintiff suing Alberta defendants for a tort committed in Alberta. After the accident, the plaintiff received hospital care in Alberta (from November 27 to December 1, 1999) before returning to stay with family in Ontario where treatment, including fitting him with a supportive vest and rehabilitative care, continued over several months.[21] When sued in Ontario, the Alberta defendants (including the driver of the vehicle in which the plaintiff was a passenger, who had also relocated to Ontario) responded by a motion to set aside service *ex juris* and stay the action on the basis of a lack of jurisdiction and that Ontario was FNC. The motions judge dismissed both motions. He characterized the proceeding as concerned with the assessment of damages because the plaintiff, as a passenger, had no real interest in apportioning fault between the two drivers and considered that unfairness to the defendants did not arise because the action would be defended by their insurers.[22]

On appeal, Sharpe J.A. confirmed the characterization of the usual rules governing grounds for service *ex juris* as procedural in nature, intended to effect timely notice to the foreign defendant and not in themselves determinative of jurisdiction. He relied in part on an article by Professor Joost Blom commenting on *Morguard* in which the learned author favoured an "administration of justice" approach to assumed jurisdiction over the "personal subjection" approach of U.S. courts—though recognizing that the latter is more consistent with *Moran v. Pyle*.[23] The problem identified with the personal subjection approach was that it narrowly focuses on the *ex juris* defendant's connection to the forum, that is, did the defendant, in U.S. terminology, "purposively avail" of the benefit of the jurisdiction of the forum as to be subject to its court in relation to its activities having impact in that forum. Blom's administration of justice approach is broader and includes consideration of factors usually considered in relation to FNC analysis, for example, the costs of litigation.[24] Sharpe J.A. also relied on an article by Watson and Au on the constitutional implications of *Morguard*, in which the authors identified criticisms of the personal subjection approach to assumed jurisdiction and conclude that the defendant's connection should be considered as one of the factors relevant to the existence of a real and substantial connection.[25]

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[21] *Muscutt v. Courcelles* (2001), 5 C.P.C. (5th) 353 (ON. S.C.J.) at 356 (per Peter B. Hockin J.)

[22] *Ibid.* at 364.

[23] Joost Blom, "Conflict of Laws – Enforcement of Extraprovincial Default Judgment – Real and Substantial Connection: *Morguard Investments Ltd. v. De Savoye*" (1991) 70 Can. Bar Rev. 733 at 741.

[24] As expressed by Blom, *ibid.*, at 752 "the best starting point in developing a Canadian theory of jurisdiction would be the core idea of *forum conveniens*, that cases should in principle be heard in the Canadian province or territory that under all the circumstances is the most appropriate forum."

[25] Garry D. Watson and Frank Au, "Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*" (2003) 23 Advocates' Q. 167.

Persuaded in favour of a broader approach, Sharpe J.A. then listed eight factors to consider in the context of assumed jurisdiction: 1) "the connection between the forum and the plaintiff's claim"; 2) "the connection between the forum and the defendant"; 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." It is not necessary to comment on each factor as it suffices for present purposes to note Sharpe J.A.'s comments on factors 3 and 7. First, in relation to factor 3, the unfairness to the defendant, he stated that driving a vehicle is "an activity that involves an inherent risk of harm to extra-provincial parties" and is subject to a pan-Canadian automobile insurance scheme that provides coverage when driving out of province coupled with an obligation on the insurer to defend an action in any province.[26] Second, in relation to factor 7, he stated that the exercise of jurisdiction when the matter has an interprovincial dimension is easier to justify than when the dimension is international.

The issues raised in *Morguard* also called upon the Court of Appeal to express itself on FNC analysis. The Court did this by confirming the usual factors, including location of the parties, location of witnesses and evidence, and applicable law as considered by the motions judge.

In the result, the Court of Appeal dismissed the appeal, finding that indeed the Ontario court had jurisdiction *simpliciter* (assumed jurisdiction) and that Ontario was *forum conveniens*.

It will be recalled that the Court then applied its *Muscutt* approach to four companion appeals. In each, the Court found that jurisdiction *simpliciter* had not been established because of the absence of a real and substantial connection, in the *Muscutt* sense. All four concerned Ontario residents injured in foreign countries: an Ontario eco-tourist seriously injured when he fell while rappelling among the treetops in Costa Rica, a recreational activity that he purchased after arrival in that country separate from the tour package he had purchased in Ontario (*Leufkens*);[27] an Ontario vacationer injured in a motor vehicle accident during a land excursion purchased on site and separate from the cruise ship holiday package (*Lemmex*);[28] an Ontario visitor injured in a motor vehicle accident on an expressway in New York when his car was allegedly struck from behind by a vehicle driven by New York resident which then caused his car to strike another vehicle also driven by a New York resident (*Gajraj*);[29]

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[26] *Supra* note 5 at paras. 86-87.

[27] *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84, 60 O.A.C. 43.

[28] *Lemmex v. Sunflight Holidays Inc.* (2002), 60 O.R. (3d) 54, 160 O.A.C. 31.

[29] *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68, 160 O.A.C. 60.

and an Ontario customer injured in a slip and fall in the rest room of a Buffalo, New York, restaurant (*Sinclair*).[30]

In each instance, the Court of Appeal characterized the consequential damage suffered in Ontario (that is, the pain and suffering in Ontario and the post-return medical care) as "significant" for the purposes of the first *Muscutt* factor ("the connection between the forum and the plaintiff's action") and thus a factor in favour of a real and substantial connection. The remaining seven factors were each found not to favour the finding of a real and substantial connection to ground assumed jurisdiction. The Court found that it was reasonably forseeable that the injured persons would return to their home country and did not constitute a *Moran v. Pyle* situation and that there was no real connection between the defendants and the forum. In considering unfairness to the defendant(s), the Court held in three of the four cases that unfairness would arise because the defendant(s) had confined their activities to their home country coupled with the absence of evidence of insurance coverage for litigation in Ontario; in the *Gajraj* case, the Court found unfairness in that the reasonable expectation of the parties to the accident would be that any litigation would take place in New York, coupled with the absence of evidence of insurance coverage for the Ontario litigation. In relation to unfairness to the plaintiff, the Court found in each instance that the plaintiff would be inconvenienced by litigation in the foreign country but that it would not be unfair because, in part, the Ontario plaintiff chose to travel to the foreign country and should not have had a reasonable expectation of suing in Ontario for injuries suffered in the foreign country.[31] Applying the four remaining *Muscutt* factors, the Court found that either there were no other defendant parties than the foreign defendants or, if there were, that the core of the legal action was against the foreign defendants; that Ontario courts would not reciprocate by enforcing a foreign judgment the mirrored situation of a foreign plaintiff suing in his or her home country for an injury suffered in Ontario because, in part, reciprocity would impose an unreasonable burden on Ontario tourism operators to defend foreign civil actions; that the cases were all international in character; and that there was no evidence that a foreign court would take jurisdiction *simpliciter* or enforce a foreign judgment on the basis of the existence of consequential damage alone—the evidence in *Gajraj* was indeed that a New York court would not enforce an Ontario judgment because consequential damage would not be accepted as satisfying the minimum contacts standard for specific jurisdiction.

From this overview of *Muscutt* and its initial applications, it should be apparent that the critical factors were insurance coverage and full faith and credit within Canada and, in the companion cases, that there was no specific connection between the defendant and Ontario (i.e., the foreign defendant had not contracted in the province for its services, etc).

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[30] *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76, 160 O.A.C. 54.

[31] ...where a party travels to another country and is involved in a motor vehicle accident there, it is reasonable to expect that a dispute with a local driver will be litigated in the foreign jurisdiction." per Sharpe J.A. in *Gajraj*, *supra* note 29 at para. 18.

## REACTION TO *MUSCUTT*

I admit that my initial reaction to *Muscutt* was not positive and has remained unchanged. Since its release, I have term after term in my Conflict of Laws course asked a student go into the hallway to invite one or more first- or second-year students (not yet tainted by knowledge of conflict of laws) to come into class where I would give a brief overview of the concepts of jurisdiction to adjudicate (jurisdiction *simpliciter*) and FNC before asking the student(s) to characterize the eight Muscutt factors as applicable to either jurisdiction or FNC. Invariably the eight factors were identified with FNC.[32] With apologies to H. Ross Perot, who in 1992 famously warned of "a giant sucking sound" of U.S. jobs going to Mexico if the U.S. ratified the North America Freed Trade Agreement, my reaction to *Muscutt* has been that it represents the "giant sucking sound" of the Ontario courts adjudicating civil actions more properly litigated elsewhere in Canada. A couple of examples should illustrate the point:

> Example 1:
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> In Nova Scotia, a 13-year-old female child accidentally discharged a firearm and caused injury to a friend also aged 13 years. Seven years later, the friend moved to Ontario where she continued to receive medical treatment for her physical injuries and psychological treatment for panic and depression. She commenced an action in Ontario to recover damages for her injuries.
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> Example 2:
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> Members of a family (husband, wife, and children) were subjected to radon gas exposure while resident in Massachusetts from late 1996 to February 1998, at which time they returned to Ontario. The husband died in Ontario in June 2003. The surviving family members commenced an action in Ontario against the Massachusetts real estate agent and their Massachusetts lawyer alleging negligence, negligent misrepresentation, and concealment of material facts in failing to advise of the need to inspect the property for radon gas emissions.
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> Example 3:

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[32] I recall one split vote in favour of FNC and that I had the impression the dissenter, voting in favour of jurisdiction, suspected I was posing a trick question and decided accordingly. The only term in which the vote favoured jurisdiction occurred in the fall term of 2009 when one second-year student participated. That student, Colin Keith, LL.B. II, subsequently acknowledged having gained some familiarity with *Muscutt* when, as a summer student, lawyers at his law firm discussed the case.

> An Ontario resident and her husband stayed at a local hotel in Quebec. On the second day of their stay, the Ontario resident suffered a slip and fall in the parking lot due to an accumulation of snow and ice. She suffered injury to her right knee. It is not clear from the case report whether she received medical treatment in Quebec or just in Ontario after her return home. The Ontario resident alleged that she suffered further injury in Ontario some ten months later when her right knee did not support her and she suffered an ankle fracture.

In all three examples, the defendant(s) brought a motion to challenge the existence of a real and substantial connection to ground assumed jurisdiction and, in the alternative, that Ontario was FNC. In two of the three examples, the superior court judge dismissed the motion on jurisdiction and held in favour of a real and substantial connection to Ontario using the *Muscutt* factors. Can you guess which one? They were the two inter-provincial cases, examples 1 and 3. The motions judge did not find a real and substantial connection in example 2, the truly international fact pattern.

Example 1 is *Miller v. Harding*.[33] The motions judge's decision on jurisdiction appears to have been influenced by the existence of insurance coverage and the psychological stress that a return to Nova Scotia for trial would cause the plaintiff. The judge was precise about the plaintiff's connection to Ontario for her medical and psychological treatment and her future connection as a resident, and about the lack of any factual connection by the defendant. But the motion had been brought, said the judge in discussing the unfairness to the defendants factor, by the defendants' insurer. At this point the judge also observed that the plaintiff would suffer psychological stress if proceedings were held in Nova Scotia but added that it was not in the interests of one of the defendants that a trial be held in Nova Scotia either—the defendant parent being a Crown attorney in that province and assumed to be publicity adverse. For this reason, the motions judge stated that the defendants' lack of a connection to Ontario actually favours the exercise of jurisdiction in Ontario.

Example 2 is *Kennedy v. Hughes*.[34] The master held that the plaintiffs failed to establish even the first *Muscutt* factor of an appropriate connection between the plaintiff and the forum. *Muscutt* and its companion cases concerned Ontario residents with only a transient connection to the foreign country where injured. In contrast, the *Kennedy* plaintiffs had been resident in Massachusetts when they alleged exposure to radon gas in their home. Considering the connection between the defendants and the forum, both defendants had restricted their business activities to Massachusetts, though the evidence indicated that the defendant lawyer was insured for any trial in Ontario. The insurance factor, however, was downplayed by the master because professional liability insurance was one-sided in contrast to the automobile insurance coverage considered in *Muscutt*, which applied to parties engaged in the same activity (driving)

[33] 2006 CanLII 29281 (ON S.C.).
[34] 2006 CanLII 32996 (ON S.C.).

and mutual risks of harm. Unfairness to the plaintiffs in not exercising jurisdiction was mitigated in this instance because, though the Massachusetts limitation period had expired, the defendants had raised the limitation issue in a timely manner and the plaintiffs had not protected themselves by commencing an action in that state. It was also significant that the fact pattern was international not interprovincial.

Example 3 is *Mynerich v. Hampton Inns Inc.*[35] The motions judge was a plain talker when identifying the critical elements to ground assumed jurisdiction. When considering the connection of the Quebec defendant to Ontario, the motions judge stated: "Clearly, however, the defendant knew that foreigners, including Ontario residents, are likely to be among its customers. Given that the enterprise is insured... I do not believe that this factor assists either the plaintiff or the defendant."[36] Having said this, the judge then negated any unfairness to the defendant by stating that the existence of insurance coverage "neutralizes this factor."[37] To be blunt, the case was interprovincial in nature and with insurance coverage. Example 3 is presented because it was decided in 2008 and because of the similarity of its fact pattern to one of the *Muscutt* companion appeals, *Sinclair v. Cracker Barrel Old Country Store Inc.*, in which the Court of Appeal held that a real and substantial connection was not established in relation to an Ontario customer injured in a slip and fall in a Buffalo, New York restaurant. The real difference between the two situations appears to be the interprovincial context of *Mynerich* and the international context of *Sinclair*. On appeal to the Court of Appeal, the panel, which included Sharpe J.A., allowed the appeal, but on the issue of the exercise of jurisdiction rather than its existence. On the jurisdiction issue, the Court merely stated: "We are not persuaded that the motion judge erred in relation to the real and substantial connection test."[38] The Court reversed, however, on the FNC motion, stating, "...the motion judge conflated the test for jurisdiction *simpliciter* with the test for *forum non conveniens*" and failed to consider all the relevant factors. The Court then held that, properly considered, none of the *Muscutt* FNC factors favoured Ontario but four favoured Quebec and two were neutral.[39]

*Mynerich* may well have been a crucial factor that led the Court of Appeal to revisit its decision in *Muscutt*. That the motions judge may have "conflated" the distinct jurisdiction *simpliciter* and FNC tests was not an isolated event. Consider again the experience in my conflicts class with first- and second-year students and the lamentable reality that conflicts is not a compulsory subject in all Canadian law faculties. Nor has such "conflation" been limited to Ontario judges. There has also been confusion in New Brunswick, where one judge applied the *Muscutt* real and substantial connection factors (instead of the differently expressed FNC factors) to determine that New Brunswick was FNC in an action that had been commenced by a

[35] 2008 CanLII 14543 (ON S.C.).

[36] *Ibid.*, at para. 10.

[37] *Ibid.*

[38] 2009 ONCA 281 (CanLII) at para. 2.

[39] *Ibid.* at para. 4.

New Brunswick plaintiff for injuries sustained in a motor vehicle accident in Maine against defendants who were also residents of Maine.[40] The real concern, however, is that the overlap between the two tests—one for the existence of jurisdiction *simpliciter* and one for determining whether to exercise an existing jurisdiction—is so strong that it is rare to find a decision in which a real and substantial connection is found but the court is then held to be FNC. In my perhaps incomplete database research, I have identified only one such judicial decision other than *Mynerich* at the court of appeal level: *Towne Meadow Development Corporation Inc. v. Israel Discount Bank Ltd.*, a divided decision of the Court of Appeal for Ontario.[41]

*Muscutt* has fostered an industry in Ontario and has been a boon for lawyers concerned with jurisdictional issues. A search on CanLII for the period June 1, 2002, to February 5, 2010, produced 154 hits in the Ontario Superior Court database and 35 in the Court of Appeal database. Considering that it would take some time for *Muscutt* to wend its way into legal argument and analysis, the time period may be contracted to seven years, which means that, on average, the Court of Appeal dealt with jurisdiction *simpliciter* and/or FNC issues, or both, an average of five times per year and the superior court did so twenty-two times per year. That represents a substantial dedication of judicial resources not to mention the litigation costs of the parties involved.

*Muscutt* has had a significant impact elsewhere in Canada as well. Though there are no decisions in the three territories, *Muscutt* has been considered by courts in each of the provinces. In Atlantic Canada, all four courts of appeal have considered the case.

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[40] *Wilson v. Farrar et al.*, 2004 NBQB 172 (CanLII); (2004), 276 N.B.R. (2d) 281 (McLellan J.).

[41] 2005 CanLII 43898 (ON C.A.); reversing 2005 CanLII 3400 (ON S.C.) on the issue of jurisdiction *simpliciter* but affirming on the issue of *forum non conveniens*. *Towne Meadow* involved a letter of credit issued by a Canadian bank in Ontario at the request of Towne Meadow, an Ontario corporation, for the benefit of the Israel Discount Bank, an Israeli corporation. When the Israeli corporation sought to demand payment upon the letter of credit, Towne Meadow sought an injunction to restrain it from so doing and the Israeli corporation, by cross motion, sought to stay the injunctive relief. The motions judge applied the relevant sets of *Muscutt* factors to hold the absence of a real and substantial connection to Ontario and that Ontario was a *forum non conveniens*. On appeal, Juriansz J.A. (Cronk J.A. concurring) reversed on the jurisdiction *simpliciter* issue finding, without elaboration, that "[t]he action clearly has a real and substantial connection to Ontario"(at para. 3) but then dismissed on the FNC issue because the appellant had failed to satisfy the Court that the motions judge had "erred in principle" when exercising his discretion on the issue. The third member of the panel, Goudge J.A., concurred with the majority on the jurisdiction issue but dissented on the FNC issue in favour of the exercise of jurisdiction by the Ontario courts. In doing so, he narrowed the legal dispute to the meaning of the Ontario letter of credit and the actions of an Ontario resident as the core analytical point because he considered most of the *Muscutt* FNC factors neutral as between Israel and Ontario.

New Brunswick trial level judges have applied the two sets of *Muscutt* factors to decide issues of jurisdiction *simpliciter* and FNC[42] but the sole decision of the Court of Appeal cast doubt on the *Muscutt* approach to jurisdiction. *Succession de feu André Gauthier v. Coutu* concerned a single-vehicle accident in Ontario that resulted in the death of the Quebec driver and the two passengers (one resident in Quebec, the other in New Brunswick).[43] In an action by the surviving spouse in New Brunswick, the motions judge applied the *Muscutt* factors on jurisdiction *simpliciter* to find the existence of jurisdiction and also concluded that New Brunswick was *forum conveniens*. The Court of Appeal dismissed an appeal by the estate of the deceased driver. In reasons for decision by Drapeau C.J.N.B., the Court expressed discontent with the *Muscutt* analysis.

In essence, the Court preferred a *Moran v. Pyle* analysis of the fact pattern. This was not a motor vehicle accident involving random strangers on a highway, but a driver and his passengers, who had a pre-accident relationship such that it was foreseeable that negligence by the driver causing the death of a New Brunswick passenger would cause consequential damage in New Brunswick to that passenger's surviving spouse. It is clear that the Court of Appeal considered that "order and fairness" is satisfied by finding a real and substantial connection between the forum and the subject matter of the action unembellished by separate considerations of fairness factors.

In contrast, the Nova Scotia Court of Appeal embraced *Muscutt*. Recalling that Forum submissions are opinion pieces, let me say (with respect) that *Bouch v. Litigation Guardian of Penny*[44] is a painful read for someone who has never been a fan of *Muscutt*. *Penny* concerned a Nova Scotia woman who moved to Alberta in 2003, became pregnant, and had a child born with medical challenges in 2004. A few weeks after the birth, Penny (a single mother) returned to Nova Scotia to benefit from her family's support. In 2005, Penny and child moved to Saskatchewan, where they remained until late 2007, when she temporarily relocated to Ontario to support an ill family member. While in Ontario she commenced an action in early 2008 alleging medical malpractice against the Alberta physicians who had attended her during her pregnancy in 2004. Five months later she moved back to Nova Scotia.

By the time the issue of jurisdiction *simpliciter* and FNC had to be decided, Nova Scotia had enacted and brought into force the *Court Jurisdiction and Proceedings Transfer Act*.[45] As none of the real and substantial connections enumerated in the Act covered the situation, the Court had to determine the existence of a real and substantial connection on common law principles. For the Court, Saunders J.A. did not try to find

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[42] For example, *Shannon v. Canadian Medical Protective Assn.*, [2006] N.B.J. No. 408 (Q.B.) (Grant J.).

[43] [2006] N.B.J. No. 38 (C.A.).

[44] (2009), 281 N.S.R. (2d) 238 (C.A.)

[45] S.N.S. 2003, c. 2 (in force 1 June 2008).

inspiration in the grounds enumerated in the Act but turned to *Muscutt* and the Court's own prior jurisprudence, including its 1998 decision in *Oakley v. Barry*.[46] The latter is a hideous case that I use in my Conflicts course to illustrate the concept of a forum of necessity. Oakley was a New Brunswick resident who received medical treatment by New Brunswick physicians in New Brunswick. She later moved to Nova Scotia, where a different diagnosis was offered and she commenced legal action in Nova Scotia against her New Brunswick physicians. In reasons by Pugsley J.A., the Court of Appeal held in favour of a real and substantial connection in large part because of the "fairness" element of the "order and fairness" value from *Morguard*; Oakley was in ill health and of limited financial resources, so it was litigation in Nova Scotia or no litigation at all. In *Penny*, Saunders J.A. relied on this earlier decision, quoting the words of Hallett J.A. in *O'Brien v. Attorney General of Canada*:

> This Court, in *Oakley*, in effect rejected the submission of counsel for the appellants that the concept of order and fairness does not apply when the Court is considering whether it should assume jurisdiction but only applies to the consideration of whether the Court ought to decline jurisdiction on the basis of *forum non conveniens*.... The concept of order and fairness is integral to the question of determining whether there is a real and substantial connection between the cause of action and the forum province. This Court has held in *Oakley* that it is not inappropriate for a court to consider as a component of the test, the fairness to the parties in determining if there is a real and substantial connection between the cause of action and the forum province that warrants a finding that the court has jurisdiction *simpliciter*.[47]

Saunders J.A. even quoted Hallett J.A. quoting La Forest J. in *Morguard*:

> It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.[48]

*Penny* does not represent a fresh reconsideration of the real and substantial connection concept by the Nova Scotia Court of Appeal but a tribute to *stare decisis* informed by *Muscutt*. Enough said.

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[46] (1998), 166 N.S.R. (2d) 282 (C.A.).

[47] *Supra* note 44 at para. 43 quoting Hallet J.A. in *O'Brien v. Attorney General of Canada* (2002), 201 N.S.R. (2d) 338 (C.A.) at para. 20.

[48] *Ibid.* quoting Hallett J.A. in *O'Brien, ibid.* at para. 14 quoting La Forest J. in *Morguard, supra* note 4 at para. 1108.

In Newfoundland and Labrador, the Court of Appeal recently granted leave to appeal in *Rolls-Royce Corp. v. Universal Helicopters Newfoundland Ltd.*[49] The action involves a claim of negligent manufacture. The trial judge applied the *Moran v. Pyle* approach to find jurisdiction *simpliciter* and held the province to be *forum conveniens*. In granting leave to appeal, Cameron J.A. observed about *Muscutt*:

> It is sufficient to say that it has been widely used in Ontario and other jurisdictions. However, there has also been criticism of the list as bringing the jurisdiction analysis too close to the *forum conveniens* analysis. As the Trial Division judge has noted, this Court has not yet considered whether the *Muscutt* factors should be applied in this Province.

At least two decisions of the Supreme Court of Newfoundland (Trial Division) have simply applied the eight *Muscutt* jurisdiction factors so, with the Court of Appeal for Ontario having revisited *Muscutt*, the Newfoundland and Labrador Court of Appeal will consider Ontario's approach with a more critical eye.

The Appeal Division of the Supreme Court of Prince Edward Island uncritically applied the *Muscutt* factors for jurisdiction and FNC in *HZPC Americas Corp. v. True North Seed Potato Co.* (2006).[50]

Moving west, *Muscutt* received only footnote mention in the Quebec Court of Appeal decision in *Worthington Corp. v. Atlas Turner Inc.*[51] In Manitoba, the Court of Appeal has considered *Muscutt* three times: twice in relation to FNC[52] and once for the real and substantial connection factors.[53] In the latter case, the Court applied the *Muscutt* factors but also stepped back to consider the totality of the connections to determine the reasonableness of exercising jurisdiction based on the real and substantial connection standard. In Saskatchewan, the Court of Appeal has referred to *Muscutt* twice in relation to FNC[54] and once in relation to jurisdiction *simpliciter*.[55] These were essentially passing references because Saskatchewan enacted the *Court Jurisdiction and Proceedings Transfer Act* in 1997 and proclaimed it in force in 2004.[56] Alberta courts have been not infrequent users of the *Muscutt* factors in relation to both

[49] 2009 NLCA 58 (CanLII) (14 October 2009).

[50] (2006), 254 Nfld. & P.E.I.R. 246 (C.A.).

[51] [2004] J.Q. No. 9246 (C.A.).

[52] *Caspian Construction Inc. v. Drake Surveys Ltd.*, [2004] M. J. No. 208 (C.A.) and *Ward v. Canada*, [2007] M. J. No. 372 (C.A.).

[53] *Commonwealth Insurance Co. v. American Home Insurance Co.*, [2008] M. J. No. 160 (C.A.).

[54] *Englund v. Pfizer Canada Inc.*, [2006] S. J. No. 9 (C.A.) and *Pichler v. Fiegehen*, [2009] S.J. No. 532 (C.A.).

[55] *Bedard v. Bedard*, [2004] S.J. No. 440 (C.A.).

[56] S.S. 1997, c. C-41.1 (in force 1 March 2004).

jurisdiction *simpliciter* and FNC.[57] The Court of Appeal applied the *Muscutt* FNC factors in *Phillips v. Avena* but did not consider the real and substantial connection factors because jurisdiction was established by consent or submission.[58]

The most interesting aspect of the Alberta jurisprudence is that Alberta had its own version of the *Muscutt* fact pattern but with the opposite result. In *Lieu v. Nazarec*,[59] an Alberta passenger was injured in Ontario when the rental car driven by her daughter, a resident of Alberta, was involved in a motor vehicle accident with a vehicle owned and driven by Ontario residents. The Alberta Court of Queen's Bench judge refused leave to serve the defendant *ex juris* in Ontario and concluded that the *Muscutt* factors pointed to jurisdiction in Ontario. The reasoning in the case was influenced by the fact that Alberta had not, as had other provinces, amended its rules to add a ground of service *ex juris* based on "damage sustained in [the province] arising from a tort or breach of contract wherever committed." The plaintiff presented an argument inspired by *Moran v. Pyle* claiming that the tort was committed in Alberta because the true nature and extent of the plaintiff's injuries was not discovered until her return to Alberta and she received extensive medical care there. In reply, the Ontario defendants successfully argued that all elements of the tort occurred in Ontario (duty, breach of duty, and damage) so the tort could not be said to have been committed in Alberta.

In British Columbia, the relevance of the *Muscutt* factors has been questioned by the Court of Appeal because that province enacted the *Court Jurisdiction and Proceedings Transfer Act* in 2003 and proclaimed it in force in 2006.[60] But that court has done more. In *Stanway v. Wyeth Pharmaceuticals Inc.*[61] (December 21, 2009) (a failure to warn case) the Court, per Smith J.A., held in favour of territorial jurisdiction under the Act, quoted Drapeau C.J.N.B. in *Coutu* as doubting the validity of the *Muscutt* approach, and cited academic criticism before stating:

> In my view, any reliance on the *Muscutt* factors as a guide to determining the question of jurisdiction came to an end in British Columbia with the coming into force of the CJPTA.
>
> One submission of the US defendants relating to the *Muscutt* factors deserves further comment.... based on *Muscutt* factors 6 to 8, they contend that territorial competence was not established because the activities found by the chambers judge to constitute a real and substantial connection do not amount to personal subjection to the jurisdiction and would therefore not be sufficient in their own jurisdiction, the United States. Thus, they contend,

[57] *Muscutt*'s entré to Alberta jurisprudence occurred in *Royal and Sun Alliance Insurance Co. of Canada v. Wainoco Oil & Gas Company*, [2004] A.J. No. 992

[58] [2006] A.J. No. 33 (C. A.).

[59] [2006] A.J. No. 716 (Q.B.).

[60] S.B.C. 2003, c. 28 (in force 4 May 2006).

[61] [2009] B.C.J. No. 2538 (C.A.).

> the taking of jurisdiction in this case would offend the policy of comity and the principles of order and fairness.
>
> *The principles of order and fairness are subsumed in the real and substantial connection test and it is not necessary to consider them independently of that test....*
>
> As I have explained, the connections between British Columbia and the subject matter of the proceeding against the US defendants as pleaded and as shown on the evidence are real and substantial. The pleading alleges the US defendants jointly with the Canadian defendants placed the products into the stream of commerce in British Columbia and failed to warn the plaintiff of the risks of using the products when they knew or ought to have known that they were unsafe for use and that they jointly carried on the business of promoting and selling the products in British Columbia. Under the "personal subjection" approach, it was therefore reasonable for them to contemplate they might be sued in British Columbia. Thus, their conduct amounts to personal subjection to the jurisdiction and the requirements of comity and its underlying principles of order and fairness are satisfied.[62]

As I read the above quotation, Smith J.A. was referring to the real and substantial test per the Act and not the *Muscutt* common law version. If so, this marks an end to the use of *Muscutt* in that province to inform consideration of a real and substantial connection when the presumptive categories of such connections are not applicable (the residual category).

## *MUSCUTT* RECONSIDERED

As mentioned above, the Court of Appeal for Ontario reconsidered *Muscutt* in *Van Breda v. Village Resorts Limited* (February 2, 2010).[63] That the justices were open to this reconsideration is certainly to the credit of both the Court and of Sharpe J.A. and is consistent with the Court's role as the court of final judgment in relation to most civil matters in Ontario, given the statistical reality for leave to appeal applications to the Supreme Court of Canada.

*Van Breda* is actually a decision on two appeals, both involving Ontario residents who contracted in Ontario for resort accommodation in Cuba. Jurisdiction in respect of the Ontario participants in the contracting effort was not in question because of their presence in the province. The real and substantial connection analysis in both appeals related principally to a Cayman Islands corporation that managed the Cuban resorts in question, Club Resorts Ltd, or CRL. In the *Charron Estate v. Bel Air Travel Group Ltd.* appeal, an Ontario tourist died while scuba diving, a recreational activity

[62] *Ibid.* at paras. 71-78 [emphasis added].

[63] *Supra* note 6.

provided by the hotel resort and included in his vacation package. In *Van Breda*, an Ontario woman suffered injuries when an exercise apparatus collapsed on the beach in front of the hotel resort. Due to the seriousness of her injuries (paraplegia), Van Breda did not return to Ontario with her common law spouse but to Alberta to be cared for by family members; she and her spouse later moved to British Columbia. Both the *Charron* and *Van Breda* actions claimed breach of contract and negligence. In the *Charron* appeal, the contractual arrangement had been made through a regular travel agency in Ontario; in *Van Breda*, it had been made through a specialized agency that connected athletes with resorts where they could barter instruction of guests in a sport activity for accommodation for two persons. The motions judges who heard the challenge to jurisdiction and FNC arguments on behalf of the out-of-province defendant(s) both applied the *Muscutt* factors and declined to dismiss the respective actions for lack of a real and substantial connection and declined to stay the actions on the basis of FNC.

In the Court of Appeal for Ontario, sitting with a bench of five justices, Sharpe J.A. reformulated the common law *Muscutt* approach in line with the ULCC's *Court Jurisdiction and Proceedings Transfer Act*. One foundational change concerned the significance attached to the grounds for service *ex juris* in provincial civil procedure rules. In *Muscutt*, these had been characterized as mere procedural notice provisions; they now were accepted as generally recognized grounds of a real and substantial connection because of their broad acceptance in provincial rules of court and in the ULCC Act. This change was certainly consistent with the unanimous judgment of the Supreme Court of Canada in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*,[64] in which LeBel J. declared that the constitutionalized real and substantial connection standard of *Morguard* not to be a distinct consideration in addition to the grounds of jurisdiction established by the legislator in article 3148 of the *Civil Code of Quebec*:

> ...Book Ten of the C.C.Q. sets out the private international law rules for the Province of Quebec and must be read as a coherent whole and in light of the principles of comity, order and fairness. In my view, it is apparent from the explicit wording of art. 3148, as well as the other provisions of Book Ten, that the system of private international law is designed to ensure that there is a "real and substantial connection" between the action and the province of Quebec and to guard against the improper assertion of jurisdiction.
>
> Looking at the wording of art. 3148 itself, it is arguable that the notion of a "real and substantial connection" is already subsumed under the provisions of art. 3148(3), given that each of the grounds listed (fault, injurious act, damage, contract) seems to be an example of a "real and substantial connection" between the province of Quebec and the action. Indeed, I am doubtful that a plaintiff who succeeds in proving one of the four grounds for jurisdiction would not be considered to have satisfied the "real and

[64] [2002] 4 S.C.R. 205.

> substantial connection" criterion, at least for the purposes of jurisdiction *simpliciter*.[65]

It should be readily apparent that the common law rules, supplemented by statutory provisions, are also amendable to being considered as informed by the values of "principles of comity, order and fairness."

A second change modified the common law in Ontario to be consistent with the ULCC approach that satisfaction of any of the grounds enumerated in section 10 created a *prima facie* presumption that a real and substantial connection existed. Thus, the grounds for service *ex juris* in Ontario, if satisfied, constitute a *prima facie* real and substantial connection. Sharpe J.A. withheld the presumptive status from two factual connections under the Ontario rules—the ground of "damages sustained" in the province and that applicable to a "necessary or proper party"—as they are "unreliable indicator[s] of a real and substantial connection."[66] Sharpe J.A. also narrowed the inquiry and the steps by affirming:

> 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.[67]

The revised approach is not to treat each of *Muscutt* factors three to eight with equal weight with the core of factors one and two, but to consider them as informing values or legal principles "to assess the relevance, quality and strength of those connections, whether they amount to a real and substantial connection, and whether assuming jurisdiction accords with the principles of order and fairness."[68] For example, whether a matter is interprovincial or international is no longer an independent factor, but informs the finding of a real and substantial connection more easily when, in the interprovincial context, there is "a uniform and shared approach to the exercise of jurisdiction."[69] In this manner, Sharpe J.A. addressed the apparent confusion between jurisdiction *simpliciter* and FNC but maintained fairness as an informing value in assessing a real and substantial connection.

Applying this revised approach to both matters under appeal, Sharpe J.A. confirmed the existence of assumed jurisdiction and that Ontario was *forum*

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[65] *Ibid.* at para. 84.

[66] *Supra* note 6 at para. 78.

[67] *Ibid.* at para. 84.

[68] *Ibid.* at para. 98.

[69] *Ibid.* at para. 105 quoting McLachlin C.J.C. in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, [2009] 1 S.C.R. 321 at para. 30.

*conveniens*. In the *Charron* appeal, CRL (the foreign defendant) was not a party to the travel package contract so the plaintiff did not benefit from the presumptive real and substantial connection on the basis of a contract made in the province. Sharpe J.A. considered four elements: 1) "the connection between the forum and the plaintiff's claim"; 2) "the connection between the forum and the defendant"; 3) "fairness"; and 4) "general principles." Considering the first factor, he did not disagree with the motions judge that a significant connection existed between the forum and the claim because the relevant jurisprudence accepted damages suffered, in certain circumstances, as a sufficient connection—one of the authorities cited in support of this proposition being the New Brunswick Court of Appeal decision in *Coutu*. Factor 2 also favoured a real and substantial connection because of CRL's activities in the province to promote its resort as a holiday destination of choice for Ontario residents (a connection inspired by *Moran v. Pyle*). Factor 3, fairness, also favoured jurisdiction because of the significance and weight of CRL's connections to the forum. Finally, in respect of factor 4, Sharpe J.A. emphasized that CRL targeted Ontario residents in Ontario to engage in its services, which contrasted with the situation in *Sinclair v. Cracker Barrel Old Country Store Inc.*, where the restaurant was a local enterprise with a local market into which the plaintiff had wandered.

In the *Van Breda* appeal, the plaintiff benefitted from the presumptive real and substantial connection because the contract in issue had been made in Ontario with CRL. Only the connection between the forum and the plaintiff posed a minor challenge because, it will be recalled, the injured plaintiff had returned not to Ontario but to Alberta and later moved to British Columbia. That, however, proved to be of no real significance because the travel package had been contracted in Ontario by the plaintiff, an Ontario resident, and the reason for not returning to Ontario was the accident itself (the alleged negligence of CRL).

Finally, it is worthy of note that Sharpe J.A. addressed the common law development of the forum of necessity concept and its express recognition in article 3136 of the *Civil Code of Quebec* and the ULCC Act.[70] CRL had argued that development of the forum of necessity concept justified narrowing the scope of the

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[70] *Court Jurisdiction and Proceedings Transfer Act*, section 6:

> Residual discretion
>
> 6. A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that:
> (a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding; or
> (b) the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required.

real and substantial connection test because forum of necessity could be invoked in difficult situations. Sharpe J.A. commented:

> The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace "forum of last resort" cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, *the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.*[71] [emphasis added]

Though Sharpe J.A. described forum of necessity as having emerged post-*Muscutt*, it actually pre-dates *Muscutt* in fact, if not in name, though that name and the concept have a history in the annals of private international law.[72] Perhaps now cases like *Oakley v. Barry* can be categorized for what they really are.

## CONCLUSION

*Van Breda* is a welcome decision by the Court of Appeal for Ontario. It represents a return to the jurisdictional path set by the Supreme Court of Canada in *Morguard*, a path in which order and fairness inform the real and substantial connection standard but are not independent factors in its determination. In these difficult economic times, enhanced certainty promotes cost-savings in litigation and legal analysis. When deciding in *Tolofson v. Jensen*[73] not to permit an exception within Canada to the *lex loci delicti* rule for choice of law in tort, La Forest J. emphasized that "[o]ne of the main goals of any conflicts rule is to create certainty in the law."[74] What is true for choice of law rules is equally true for jurisdictional rules. It is hoped that *Van Breda* restores some of the "certainty" lost to jurisdictional issues with *Muscutt*. I, for one, am pleased that it is gone.

One of the ironies of *Muscutt* is its conception of specific jurisdiction in U.S. law as focussing exclusively on the conduct of the defendant, that is "purposefully avail." But, consideration of U.S. case law reveals a broader approach. The so-called

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[71] *Supra*, note 4, at para. 100.

[72] See: J. McEvoy, 'Forum of Necessity in Quebec Private International Law: C.c.Q. art. 3136" (2005), 35 Revue générale de droit 63-124.

[73] [1994] 3 S.C.R. 1022.

[74] *Ibid.*, at 1061.

*Burger King*[75] (also known as the *Zippo*[76]) test involves three factors: 1) an act by which a non-resident purposely avails of the privilege of conducting activities in the state such as to invoke the benefits and protections of state law; 2) that the plaintiff's claim arises or results from defendant's activities in the state; and 3) that the exercise of jurisdiction by forum is not unreasonable. This test is inspired by the famous 1945 decision of the Supreme Court of the United States in *International Shoe*, which conditioned assumed jurisdiction on "minimum contacts" between the non-resident defendant and the state forum.[77] With *Muscutt* and *Van Breda*, the Court of Appeal for Ontario promoted harmony between Canadian and U.S. law on jurisdiction.

Finally, every province and territory that has not enacted the ULCC's *Court Jurisdiction and Proceedings Transfer Act* should do so and be quick about it, including Ontario.

[75] *Burger King Corporation v. Rudzewicz*, 105 S. Ct. 2174, at 2182 (1985).

[76] *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (1997).

[77] *International Shoe Co. v. Washington*, 66 S. Ct. 154, at 158.