REFORMULATING A REAL AND SUBSTANTIAL CONNECTION

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1. INTRODUCTION

One of the most important issues in private international law is the question of when a court will take jurisdiction over a civil dispute involving a defendant who is not present in the forum and who does not submit to the proceedings. Since *Morguard Investments Ltd. v. De Savoye* the requirement has been that there must be "a real and substantial connection" between the dispute and the forum to take jurisdiction in such a case.[1] This phrase is at the heart of the analysis of jurisdiction, both at common law and in recent statutes dealing with the issue.

By necessity, the real and substantial connection requirement has to be both sufficiently open-ended and flexible to accommodate the wide range of civil cases that come before Canadian courts and sufficiently clear to provide a common frame of reference and produce predictable results. In 2002 the Court of Appeal for Ontario created a framework for analyzing a real and substantial connection, setting out, in *Muscutt v. Courcelles*, eight factors to consider.[2] This framework became the standard in Ontario and was adopted by appellate courts in some other Canadian provinces. However, in 2009, in preparing to hear two appeals of decisions on motions challenging the court's jurisdiction,[3] the Court of Appeal for Ontario indicated that it was willing to consider whether any changes were required to the *Muscutt* framework.

The two cases, consolidated on appeal as *Van Breda v. Village Resorts Limited*, each concerned serious injuries that were suffered outside of Ontario.[4] In the case of *Charron Estate v. Bel Air Travel Group Ltd.*, Mr. Charron went on a holiday to Cuba and died during a scuba dive. His estate and dependants sued several defendants in Ontario, one of which was Club Resorts Ltd., a Cayman Islands corporation that

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1 [1990] 3 S.C.R. 1077 [*Morguard*]. See also *Hunt v. T&N plc*, [1993] 4 S.C.R. 289.

2 (2002), 60 O.R. (3d) 20 (C.A.) [*Muscutt*].

3 *Van Breda v. Village Resorts Ltd.* (2008), 60 C.P.C. (6th) 186 (Ont. S.C.J.) and *Charron Estate v. Bel Air Travel Group Ltd.* (2008), 92 O.R. (3d) 608 (S.C.J.).

4 2010 ONCA 84 [*Van Breda*].

managed the resort in Cuba and had arranged the scuba diving. In the other case, Ms. Van Breda was on holiday in Cuba. She was using a chin-up bar at a resort when it collapsed, which rendered her a paraplegic. She and her family members sued several defendants in Ontario, including Club Resorts Ltd., which was also the manager of that resort. Club Resorts Ltd. argued before the motion judges and on the appeal that the Ontario court did not have jurisdiction over these claims. The motion judges applied the framework in *Muscutt* and dismissed the defendants' motions, finding that there was a real and substantial connection between the claim against Club Resorts Ltd., and Ontario. Ultimately the Court of Appeal reached the identical conclusion and dismissed both appeals. It is the appellate court's reasoning, more than the result, that is worthy of close study.

2. WILLINGNESS TO REVISE THE FRAMEWORK

The Court of Appeal identified five reasons why it was prepared to reconsider the framework from *Muscutt*.[5] First, the Court could have considered seven years worth of jurisprudence to evaluate how the framework was handling a wide range of factual situations. Second, the Court could take into account subsequent decisions, particularly those of the Supreme Court of Canada, that bear on the issue of taking jurisdiction. Third, and perhaps most importantly, the Court could have compared the common law with recent statutes on jurisdiction adopted in other provinces. At the time of *Muscutt*, the Uniform Law Conference of Canada had developed its model *Uniform Court Jurisdiction and Proceedings Transfer Act*,[6] but it had only been adopted in one province.[7] Since *Muscutt*, support has been growing for the CJPTA and it has been adopted in two other provinces.[8] Fourth, the Court could have assessed the impact of the emerging concept of a "forum of necessity," allowing a court to take jurisdiction even in the absence of a real and substantial connection.[9] Fifth, the Court could take into account the extensive academic literature on the *Muscutt* framework over the past decade.

Yet these five reasons, taken separately or together, are not so forceful that a change in the jurisprudence was inevitable. In fact, the Court defended its earlier decision in quite strong terms, noting "With regard to the alleged uncertainty produced

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[5] *Ibid.* at paras. 50-58.

[6] Available at http://www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_ProceedingsTransfer_Act_En.pdf [*UCJPTA*].

[7] *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1.

[8] *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2. It has been enacted, but not brought into force, in the Yukon (S.Y. 2000, c. 7) and Prince Edward Island (S.P.E.I. 1997, c. 61). The Alberta Law Reform Institute has recently recommended its adoption in that province: *Enforcement of Judgments* (Final Report No. 94, 2008).

[9] See Janet Walker, "*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48 C.B.L.J. 135.

by *Muscutt*, the appellants did not challenge the correctness of the results reached in the *Muscutt* quintet and were unable to identify conflicting or wrongly decided cases under the *Muscutt* test."[10] Defendants frequently challenge the jurisdiction of Ontario courts, and so it is remarkable that in all that jurisprudence there are so few examples–if any–of incorrect decisions. This is high praise for the *Muscutt* framework.

Despite this apparent success, the Court determined that "it is appropriate to make several clarifications and modifications to the *Muscutt* test."[11] The Court offered two central reasons for this conclusion. First, it wanted to adopt some of the features of the CJPTA, bringing Ontario into line with the national approach to jurisdiction. Second, it considered itself obliged to address the criticism that the eight-factor test is too complicated and hard to apply.[12]

3. A PRESUMPTION OF A REAL AND SUBSTANTIAL CONNECTION

In Ontario, rule 17.02 of the *Rules of Civil Procedure* provides that a plaintiff may serve a defendant outside Ontario with an originating process in certain defined categories of cases.[13] For example, the category in rule 17.02(g) covers claims "in respect of a tort committed in Ontario." Prior to *Morguard*, the analysis of jurisdiction centered on whether the plaintiff's claim fell within one or more of the enumerated categories. However, *Morguard* established, and *Muscutt* confirmed, that rule 17.02 did not in itself create jurisdiction. Separate and apart from whether the claim fell inside the categories, the plaintiff had to establish that there was a real and substantial connection between the dispute and the forum.[14]

In *Van Breda* the Court made a significant change to the relationship between the categories in rule 17.02 and the real and substantial connection requirement. It has now held that if a case falls within the categories in rule 17.02, other than rules 17.02(h) and (o), a real and substantial connection with Ontario shall be presumed to exist.[15] The central catalyst for this change is section 10 of the CJPTA. Section 3 of that statute provides in quite general terms that a court has jurisdiction when there is a real and substantial connection between the dispute and the forum. However, section 10 contains a list of specific situations in which a real and substantial connection is

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[10] *Van Breda*, *supra* note 4 at para. 68. The "quintet" refers to the fact that four other related cases were decided by the court at the same time as was *Muscutt*, *supra* para. 1.

[11] *Ibid.* at para. 70.

[12] *Ibid.* at para. 69. It is interesting to note that after *Van Breda* was argued, but before the decision was released, the British Columbia Court of Appeal was particularly critical of *Muscutt* in *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592.

[13] R.R.O. 1990, Reg. 194.

[14] See 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" (2006) 85 Can. Bar Rev. 61 at 82-85.

[15] *Van Breda*, *supra* note 4 at para. 72.

presumed to exist. Ontario has not adopted the CJPTA, but in *Van Breda* the Court has adopted the CJPTA's basic approach.[16]

This change raises several questions. First, how comparable are the rule 17.02 categories and the presumptions in section 10 of the CJPTA? Second, why are the categories in rules 17.02(h) and (o) excluded? Third, how will the presumption operate when challenged by defendants?

The factual connections itemized in section 10 of the CJPTA were drafted specifically to serve as presumptions of a real and substantial connection. The categories in rule 17.02 were not. The Court stressed the similarities in wording between the two,[17] and much of the language is very similar, but there are some important differences. Rule 17.02(d) catches a claim against a trustee in respect of the execution of a trust as long as there are any trust assets in Ontario. In contrast, section 10(d) provides that if the basis for jurisdiction is trust assets in Ontario, the relief claimed must be only in respect of those assets. Rule 17.02(f)(iv) catches a claim where a contract has been breached in Ontario. There is no equivalent provision in section 10. Yet in *Van Breda* the court gave all aspects of rule 17.02, other than rules 17.02(h) and (o), the same presumptive effect as section 10 of the CJPTA.

As noted, in *Van Breda* the Court excludes rule 17.02(h), dealing with cases in which damage has been sustained in Ontario, and rule 17.02(o), dealing with necessary or proper parties. The Court did this on the grounds that these categories are too broad to reliably indicate a real and substantial connection with Ontario.[18] This approach is quite correct, and it was precisely this breadth that led the court in *Muscutt* to separate the rule 17.02 analysis from the real and substantial connection requirement. But, as noted above, there is breadth in some of the other rule 17.02 categories. The exclusion of only rules 17.02(h) and (o) is somewhat imprecise. The Court could have given presumptive effect only to those elements of rule 17.02 that have a direct equivalent in the CJPTA, but it did not so limit its reasoning. In addition, the Court's middle-ground approach means that when the rule 17.02 categories are amended, or new categories are added, the courts will have to determine whether presumptive effect applies in respect of those changes on a case-by-case basis.

Presumptions raise the classic debate between certainty and flexibility. The presumed outcome provides the former, while the fact that the presumption can be rebutted provides the latter. As a result, an important issue with any presumption

[16] The Ontario Law Commission is studying whether Ontario should adopt the CJPTA: see the consultation paper by Janet Walker entitled "Reforming the Law of Crossborder Litigation: Judicial Jurisdiction"; Vaughan Black & Stephen G.A. Pitel, "Reform of Ontario's Law on Jurisdiction" (2009) 47 C.B.L.J. 469.

[17] *Van Breda*, *supra* note 4 at para. 74.

[18] *Ibid.* at paras. 78-79.

is the test for rebutting it. The more difficult it is to rebut, the less flexibility; the easier, the less certainty. In *Van Breda* the Court was silent on this issue: it made no explicit statement as to how hard or easy it is to rebut the presumption. In the appeal in Ms. Van Breda's case, the Court stated "As this presumption is not conclusive, it remains open to [the defendant] to demonstrate that in the particular circumstances of the case, the real and substantial connection test is not met."[19] The Court then went on to conclude that there was a real and substantial connection to Ontario. It appears, from this analysis, that the presumption will not have any particular tenacity: once the defendant challenges it, the court will analyze whether there is, or is not, a real and substantial connection. This is the preferred approach, since in the area of assessing jurisdiction flexibility is highly important and should take priority over certainty.

In the future, in the cases where the defendant seeks to rebut the presumption it would be unfortunate if courts used the presumption as an express basis for their decisions. In such cases the courts should articulate whether the factors to be considered indicate that there is, or is not, a real and substantial connection to Ontario. The courts should refrain from merely concluding that the factors identified by the defendant are insufficient to rebut the presumed real and substantial connection. *Van Breda* leaves both possible lines of reasoning open, which is worrying, but in the specific appeal before the court the issue is properly assessed.

4. REFORMULATION OF THE FRAMEWORK

Adopting presumptions of a real and substantial connection only takes matters so far. A framework for analyzing whether there is a real and substantial connection is still required in any case where a defendant seeks to refute a presumption, any case in which a plaintiff is relying on rule 17.02(h) or (o) so that no presumption arises, and any case in which a plaintiff does not rely on 17.02 at all and instead seeks leave of the court to serve a defendant outside Ontario under rule 17.03. Prior to *Van Breda* the courts used the *Muscutt* framework, which considered the following eight factors to determine whether there was a real and substantial connection to Ontario: (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 taking jurisdiction, (4) unfairness to the plaintiff in not taking jurisdiction, (5) the involvement of other parties, (6) the court's willingness to enforce a foreign judgment rendered on the same jurisdictional basis, (7) whether the dispute is international or interprovincial, and (8) comity and the standards of jurisdiction used by other courts.[20]

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[19] *Ibid.* at para. 136. See also para. 109(1): "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" [emphasis added].

[20] *Supra* note 1 at paras. 75-110.

Despite how well the *Muscutt* framework has been operating, in *Van Breda* the Court determined that it was necessary to "simplify the test and to provide for more clarity and ease in its application."[21] Unfortunately, it is highly debatable as to whether the Court has achieved that objective. An early concern in this respect is that the Court's summary of the reformulated framework is considerably longer and denser than the eight factors listed in *Muscutt*.[22]

Since *Muscutt* one of the key debates has been whether factors (3) to (8) are properly relevant to assessing jurisdiction or should be confined to the *forum non conveniens* analysis. In *Van Breda* the Court took a middle ground position that is difficult to explain. It held that "the core of the real and substantial connection test" is factors (1) and (2), and held that factors (3) to (8) will now "serve as analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the defendant."[23] The Court affirms that factors (3) to (8) remain relevant to the issue of jurisdiction, which is welcome and much preferable to excluding them altogether. But the Court nevertheless reworks the framework, ostensibly so that no one factor from factors (3) to (8) could be analyzed separately from the other factors and could be independently determinative of the outcome. However, the jurisprudence since *Muscutt* shows this concern to be unwarranted: factors (3) to (8) have not been used in that way. The eight-factor framework has not produced decisions in which courts have held, for example, that the test is met based solely on unfairness to the plaintiff in not taking jurisdiction. Moreover, the Court's own new approach is somewhat at odds with its own language about factor (6), which both in principle and in application the court still seemed to treat as an independent factor.[24]

As a practical test for a real and substantial connection, the new *Van Breda* framework is disappointing. A factor either should be considered or it should not, and it confuses matters to re-label a relevant factor as an analytic tool. The Court holds that factors (3) to (8) should no longer be listed "as one of several items on a multi-factor list having more or less equal weight with the other factors."[25] But factors need to be listed in a reasonably convenient way for courts to take them into account. And it is not correct to suggest, as the Court does, that in the jurisprudence applying *Muscutt* each of these factors problematically had more or less the same weight. It has been well established, for example, that factors (1) and (2) carry relatively more weight. Overall the Court's language on factors (3) to (8) is unfortunately vague: phases like "analytic tool," "general principle of law," and "principle a court should bear in mind"

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[21] *Supra* note 4 at para. 83.

[22] *Ibid.* at para. 109.

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

[24] *Ibid.* at para. 103: "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". See also para. 124.

[25] *Ibid.* at para. 108. See also paras. 103 and 106.

do not further the stated goal of greater clarity.[26] In sum, the most troubling part of the decision is the Court's reworking of the framework for analyzing a real and substantial connection.

5. TAKING AND DECLINING JURISDICTION

In *Van Breda* the Court reaffirms the important separation between the issue of taking jurisdiction and the issue of declining to exercise jurisdiction on the basis of *forum non conveniens*.[27] This confirmation is welcome, since from an examination of the cases it is apparent that lawyers and judges frequently fail to appreciate the distinction between having jurisdiction and the discretion to choose not to exercise jurisdiction by staying proceedings.[28] However, in stressing this separation the Court may have gone too far. In response to concerns raised about *Muscutt* that the eight-factor framework leads to duplication of analysis on each of these two distinct issues, the Court has now stated that "the factors listed for consideration at the second, discretionary, *forum non conveniens* stage, have no bearing on real and substantial connection and, therefore, should not be considered at the first stage of jurisdiction *simpliciter* analysis."[29]

The difficulty here is that the Court seems to have overstated this point. Some core factual connections must be considered as part of both issues. This fact should be clear from the nature of the analysis itself. The test for jurisdiction attempts to determine whether a dispute has sufficient factual connections to the forum. The test for *forum non conveniens* attempts to determine which of the forum and a foreign jurisdiction has the better factual connections to the dispute. So the factual connections between a dispute and the forum must be part of the analysis for both issues. For example, as a factual connection, the place where a tort was committed or where a contract was breached must be relevant both to assessing a real and substantial connection and to the analysis under *forum non conveniens*. To take another example, the fact that a defendant resides in Michigan will be relevant both to determining whether there is a real and substantial connection to Ontario and to *forum non conveniens*.

What needs to be kept separate are the two issues of taking and declining jurisdiction. It is not a logical corollary to that separation that certain factual connections must only be relevant to one issue or the other. It is entirely possible

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[26] *Ibid.* at paras. 98, 103, 106 and 108. In applying the factor concerning fairness to the defendant and to the plaintiff (the court having held these should now be treated as a single factor rather than as two factors: para. 97) the court's approach (at para. 121) was to "consider the connections between the claim, [the defendant] and Ontario *through the lens of fairness* to assess their significance and weight in relation to a real and substantial connection" [emphasis added]. This is not an easy approach to understand.

[27] *Ibid.* at paras. 81-82.

[28] Cheryl Dusten & Stephen G.A. Pitel, "The Right Answers to Ontario's Jurisdictional Questions: Dismiss, Stay or Set Service Aside" (2005) 30 Adv. Q. 297.

[29] *Van Breda, supra* note 4 at para. 82.

to separate the issues while considering various factual connections as relevant to both, and examples of courts doing precisely that abound in the jurisprudence. In *Van Breda* the court appears to be attempting to create a rigid separation of the factors to be addressed on each issue. Such a separation is of doubtful utility,[30] and in any case is, at least as far as core factual connections are concerned, not possible.

6. A FORUM OF NECESSITY

Section 6 of the CJPTA provides for what has been called a forum of necessity. Under this provision, a court that lacks jurisdiction over a dispute can nevertheless hear that dispute if either there is no court outside the forum where the plaintiff can commence proceedings or commencing proceedings in a court outside the forum cannot be reasonably required. This provision might, for example, allow a person tortured in a foreign country to sue the torturers, despite the lack of connecting factors between the place of the torture and the forum. It has been argued that due to extraterritoriality this section of the CJPTA is "fragile from a constitutional point of view."[31]

While not necessary to decide the issues raised on the appeals, in *Van Breda* the Court, as a matter of common law, adopts the concept of a forum of necessity. It states that "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."[32] The Court's analysis of this issue is problematic. It is surprisingly brief and makes no mention of the possible constitutional deficiencies in this approach. The Court has also left itself open to the charge that this development should have been left either to the legislature or for another case raising the forum of necessity directly and featuring more detailed submissions on the point.

7. CONCLUSION

For many, *Van Breda* violates the idiom "if it ain't broke, don't fix it." The *Muscutt* framework was well-known and was working effectively.[33] It was relatively easy to explain and to apply. In time we will know if as much can be said for the use of presumptions and the *Van Breda* framework, but for the moment there are questions about how the presumption will operate when challenged by a defendant and about the ongoing role of the factors the Court now calls analytic tools.

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[30] Vaughan Black & Mat Brechtel, "Revisiting Muscutt: The Ontario Court of Appeal Takes Another Look" (2009) 36 Adv. Q. 35 at 44-45.

[31] Elizabeth Edinger, "New British Columbia Legislation: *The Court Jurisdiction and Proceedings Transfer Act*; *The Enforcement of Canadian Judgments and Decrees Act*" (2006) 39 U.B.C.L. Rev. 407 at 417. For inconclusive judicial discussion see *Lailey v. International Student Volunteers, Inc.*, 2008 BCSC 1344 at paras. 41-49.

[32] *Supra* note 4 at para. 100. See also para. 109(10).

[33] Black & Brechtel, *supra* note 30 at 35.

In its reasons, the court was undoubtedly motivated by efficiency concerns. The most influential reason behind adopting these presumptions is that this "will simplify and reduce the instance and cost of litigation on the issue of jurisdiction."[34] Similarly, the test for a real and substantial connection is reworked to achieve greater "clarity and ease in its application."[35] In straightforward cases, rather than using the eight factors from *Muscutt*, courts will now likely proceed as follows. In some cases the issue of jurisdiction will be determined based solely on the presumption, unchallenged or not seriously challenged by the defendant, and so no factors will need to be considered. In some other cases the court will determine whether there is a real and substantial connection with reference only to the two factors *Van Breda* has called the core of the test: the connections between the forum and the plaintiff's claim and the defendant. The demotion of the other six factors to analytical tools means that in practice they will have a much reduced role and in some cases will not be mentioned at all. This change will certainly streamline the analysis in simple cases, yet it is hard to see how in such cases using the *Muscutt* approach was so burdensome or produced incorrect decisions. Moreover, as noted, we now have some unsettled aspects of the new approach that could prove difficult in more complicated cases. When familiar tests are modified, uncertainty and confusion are likely, if only in the short term.

As a final, broader point, *Van Breda* is likely to have repercussions beyond the context of taking jurisdiction. The real and substantial connection test is used in other contexts, most notably as part of the test for whether a court will recognize and enforce the judgment of another province or a foreign country.[36] In that context, courts have used the *Muscutt* framework to determine whether there was a real and substantial connection between the dispute and the forum in which the judgment was rendered. It is an open question whether the use of presumptions and the reformulated framework in *Van Breda* are now to replace that approach in that context.

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[34] *Ibid.* at para. 77.

[35] *Ibid.* at para. 83.

[36] *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416.