UNLOCKING THE MYSTERIES OF JURISDICTION: THE *VAN BREDA* CASE

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Introduction

When a Canadian court can assume jurisdiction over a law suit whose genesis originates in a foreign jurisdiction has proved to be a thorny issue for both lawyers and judges. Private international law seeks to regulate the relationship between foreign litigants, parties in the jurisdiction and the domestic court.

During the past 25 years or so, various Canadian courts have attempted to articulate legal principles to define this relationship. One of the critical questions that the courts have sought to answer has been in what circumstances should a Canadian court assume jurisdiction over a foreign defendant. The answer to this question began 22 years ago in the Supreme Court of Canada's decision in *Morguard Investments v. De Savoye* and recently culminated in the Supreme Court of Canada's decision of *Club Resorts Ltd. v. Van Breda*. This paper traces the development of the jurisdiction test from *Morguard* to *Van Breda* and outlines the implications of the *Van Breda* test for foreign and domestic litigants.

The Development of the Real and Substantial Test

The Supreme Court of Canada in *Morguard* established that the proper exercise of assumed jurisdiction was predicated on two key principles, first, "order and fairness" and its corollary, jurisdictional restraint. The key principle the Court developed in *Morguard* was the "real and substantial connection" test, that is that there had to be a real and substantial connection between the defendant, the subject matter of the law suit and the forum. Justice La Forest explained the rule as follows in *Morguard*: [1]

> It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But it hardly accords with the principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit … Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.

In *Tolofson v. Jensen*, a case that focused on what law should apply in a conflicts case, the Supreme Court of Canada again emphasized that the real and substantial connection test had the

[1] [1990] 3 S.C.R. 1077 at paragraph 42

effect of "preventing a court from unduly entering into matters whereby the jurisdiction in which it is located has little interest".[2] In *Hunt v. T & N*, the Court elevated the *Morguard* principles to a constitutional plane and held that these principles were "constitutional imperatives".[3] In short, constitutional restrains required a court to assume jurisdiction only where a real and substantial connection was established.

However, the Supreme Court, neither in *Morguard* nor in the cases that followed *Morguard* gave any content to the phrase "real and substantial connection". This vacuum created a need for lower courts across Canada to give meaning to the "real and substantial connection" test. As a result a number of differing approaches arose across Canada.

A number of different approaches for determining real and substantial connection had emerged across Canada by the time the Supreme Court considered the *Van Breda* case. First, the *Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") was adopted in a number of provinces and one territory. Secondly, the Ontario Court of Appeal's test in *Muscutt v. Courcelles* became the preferred approach in a number of the common law jurisdictions.[4] Subsequently, the modified test in *Van Breda v. Village Resorts*[5] was articulated by the Ontario Court of Appeal as well as the New Brunswick Court of Appeal's test set out in *Coutu v. Gauthier Estate*.[6] In addition, Quebec developed its own answer to the problem in the *Civil Code of Quebec*[7] that governs that province.

The *CJPTA* modeled on a code that was developed by the Uniform Law Conference of Canada in the wake of the *Morguard* decision. The *CJPTA* has been adopted in British Columbia, Saskatchewan, Nova Scotia and Yukon. It has been recommended for adoption in Alberta by the Alberta Law Reform Institute. Section 10 of the *CJPTA* provides a list of enumerated connections which, if established in a case, lead to a presumption of jurisdiction as these connections are deemed "real and substantial".

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[2] [1994] 120 D.L.R. (4th) 289 at p.304 (S.C.C.)]. (*Tolofson*)
[3] [1993] 4 S.C.R. 289
[4] [2002] 60 OR (3d) 20; 213 DLR (4th) 577; 160 OAC 1
[5] 2010 ONCA 84
[6] [2006] 296 NBR (2d) 34; 264 DLR (4th) 319
[7] S.Q. 1991, c. 64 Book Ten, arts. 3076 to 3168

In contrast, the Court of Appeal for Ontario developed a multi-factor test in *Muscutt v. Courcelles* and its companion cases. The *Muscutt* test involved the weighing of eight different factors to determine whether there were grounds to assume jurisdiction. Two of the key factors in this test were unfairness to the plaintiff and unfairness to the defendant in assuming jurisdiction. The *Muscutt* test was highly discretionary and difficult to apply. It gave no guidance to motion judges on how to weigh the various factors. The discretionary nature of the test led to significant academic criticisms that the *Muscutt* test was too unpredictable.[8] This academic criticism of *Muscutt* as well as the criticism of the New Brunswick Court of Appeal in the *Coutu* case coupled with the implementation of the *CJPTA* in a number of Canadian jurisdictions was the impetus behind the Court of Appeal's decision to reconsider the *Muscutt* test in *Van Breda*.

In *Van Breda*, the Court revised the *Muscutt* test and developed a hybrid test that retained some of the discretionary elements found in *Muscutt*. At the first stage of this new test, the Court of Appeal adopted the Ontario service *ex juris* rules (Rule 17.02) as presumptive categories for assuming jurisdiction save and except for Rule 17.02(h) and (o), that is "damages sustained in the jurisdiction" and the "a necessary or proper party". If the case did not fall into one of the categories then the onus was on the plaintiff to show that an analogous category existed. If the case fell into one of the categories set out in Rule 17.02 then the onus shifted to the defendant to show that the fact pattern of the case did not show a real and substantial connection.

At the second step, although "the core of the analysis rests upon the connection between Ontario, the plaintiff's claim and the defendant", the *Muscutt* factors were to be used as analytical tools in evaluating the significance of the connections between the forum, the claim and the defendant.[9]

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[8] see for example Vaughan Black & Mat Brechtel, "Revising *Muscutt*: The Ontario Court of Appeal Takes Another Look" (2009) 36 Adv. Q. 35; Vaughan Black & Stephen G.A. Pitel, "Reform of Ontario's Law on Jurisdiction" (2009) 47 C.B.L.J. 469; Janet Walker, "*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48 C.B.L.J. 135; Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 McGill L.J. 555; Tanya J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007) 33 Queen's L.J. 179

[9] at paragraph 84

The Supreme Court of Canada granted leave to appeal the Court of Appeal's decision and the case was argued in March of 2011. The Supreme Court of Canada released its reasons in *Van Breda* and *Charron* on April 18, 2012.

The Facts

The Court of Appeal and the Supreme Court of Canada heard the *Van Breda* case with another case arising from Cuba, *Charron v. Club Resorts Ltd. et al*. The facts in the *Van Breda* case were as follows.

In June 2003, Morgan Van Breda and her partner, Viktor Berg, both Ontario residents at the time, traveled to the SuperClubs Breezes Jibacoa resort in Cuba. Viktor, a professional squash player, had arranged the trip through Rene Denis. Denis operated a business in Ontario that helped arrange for Ontario racquet professionals to travel to Cuba to teach at Caribbean resorts in exchange for free accommodation for the professional and his guest.

On the first day at the resort, Morgan and Viktor went for a walk on the beach and came across a metal apparatus, which in fact was a soccer goal. Morgan tried to do some chin-ups on the apparatus. It collapsed and Morgan tragically was rendered a paraplegic. Morgan was initially taken to Havana and then flown to Calgary where her family then resided. Morgan and Viktor later moved to British Columbia. They never returned to Ontario.

Morgan, Viktor and Morgan's family commenced an action in Ontario against Mr. Denis (an Ontario defendant), and a number of foreign defendants, including Club Resorts Ltd., a Cayman Islands company that managed the resort. The plaintiffs chose not to sue the owner of the resort, Jibacoa S.A., which was a company owned in part by the Cuban government.

Evidence was adduced before the motion judge from a former Canadian ambassador to Cuba that Cuba would not permit the defence witnesses to leave Cuba and that Canada would not permit the witnesses into the country. In addition, there was also evidence led that showed that there were no treaties between Canada and Cuba that would allow for the Cuban witnesses' evidence to be obtained by other means.

The facts in the *Charron* action were somewhat different. In January 2002, Claude Charron and his wife Anna Charron, both Ontario residents, visited Bel Air, a travel agency in Barrie, to book

a vacation. The Bel Air representative provided the Charrons with a brochure from Hola Sun, an Ontario tour operator that offered vacation packages in Cuba. The brochure included scuba diving as an included feature in the package at Breezes Costa Verde in Cuba.

The Charrons purchased a one-week vacation package through Bel Air and Hola Sun for the Breezes Costa Verde Club. They traveled to the resort in February 2002. On February 11, 2002, Claude went scuba diving without incident. Tragically, the following day Claude died during his dive.

The Charron family commenced an action in Ontario against Bel Air and Hola Sun, both Ontario defendants, as well as a number of foreign defendants, including Club Resorts, the manager of the resort. There was evidence on the record in the *Charron* case that Club Resorts Ltd. had a business office in Ontario and carried out frequent business trips to Ontario to promote its product.

The Supreme Court of Canada's Decision

The decision from the Supreme Court of Canada was released on April 18, 2012. The Supreme Court made several important rulings in *Van Breda* which will have a significant impact on Canadian private international law.

Uniformity

At the Supreme Court of Canada, Club Resorts Ltd. ("Club Resorts") took the position that the Supreme Court ought to adopt a common law approach similar to the *CJPTA*. Club Resorts argued for a uniform standard of assuming jurisdiction across Canada save and except those provinces where a statute governing jurisdiction had already been legislated. The Court firmly rejected this argument and held that each province can adopt its own standard as long as it met constitutional minimums:

> [34] To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system.

As a result, there will likely continue to be somewhat of a diversity of jurisdiction tests across the country, especially between provinces that have enacted the *CJPTA* and those that have not.

The Real and Substantial Connection Test

In *Van Breda* the Supreme Court of Canada has sought to bring greater certainty and predictability to the real and substantial connection test. The Court rejected the injection of the various factors as set out in *Muscutt*. Rather, a plaintiff, in a tort action in Ontario must demonstrate the presence of a "presumptive connecting factor" that links the subject matter of the litigation to Ontario. The Court identified four "presumptive connecting factors":[10]

(i) The defendant is domiciled or resident in the province;
(ii) The defendant carries on business in the province;
(iii) The tort was committed in the province; and
(iv) A contract connected with the dispute was made in the province.

This list is not exhaustive and it is open to a plaintiff to demonstrate an analogous ground to establish a real and substantial connection. In identifying a new presumptive factor, courts should look to the similarity of the proposed connecting factor to the recognized presumptive factors, as well as the treatment of the connecting factor in case law. Statute law and the private international law of other legal systems that share a commitment to order, fairness and comity are other areas that court should examine.[11] In assessing a new connecting factor and whether it should be given a presumptive effect, the principles of order, fairness and comity are a useful tools in assessing the validity of the proposed connecting factor as these principles underlie all connecting factors, whether new or old.[12]

If a presumptive connecting factor is present, then the onus is on the defendant to rebut the presumption. If the defendant cannot rebut the presumption them the court must assume jurisdiction over the case.[13] The Supreme Court of Canada gave several examples of situations in which the presumption could be rebutted. If the presumptive factor was carrying on business

[10] Paragraph 90
[11] paragraph 91
[12] paragraph 92
[13] paragraph 94

then the defendant could rebut the presumption if it could show that that the subject matter of the litigation was unrelated to the defendant's business activities in the province. If the presumptive factor was a contract made in the province, then the presumptive could be rebutted by showing that the contract had little or nothing to do with the subject matter of the litigation.

If however there is no presumptive connecting factor present, whether listed or new, then the court should not assume jurisdiction. Justice LeBel cautioned against a court taking jurisdiction on the basis of the cumulative effect of a number of non-presumptive factors as it would open the door to assuming jurisdiction on a case-by-case exercise of discretion.[14]

The Court also made several other key points. First, the presence of the plaintiff in the jurisdiction, on its own, is not a connecting factor.[15] Active advertising in the jurisdiction, such as a web site that can be accessed in the jurisdiction, does not constitute carrying on business in the jurisdiction. More is needed to make out the notion of carrying on business in the jurisdiction as it requires some actual presence in the jurisdiction, whether it be maintaining an office or regularly visiting the jurisdiction.[16]

It is important to note that the Court chose not to address forum of necessity or forum of last resort and specifically left that issue to another day.[17] However, it should be noted the Ontario Court of Appeal did briefly address this issue.[18] Moreover, section 6 of the *CJPTA* establishes a residual discretion for forum of necessity cases.

The *Van Breda* decision is a marked departure from the *Muscutt* test and represents a significant step forward in providing predictability in this area of the law. It removes a large element of discretion that motion judges had under the rubric of unfairness to the litigants under the *Muscutt* test. The *Van Breda* test should provide greater certainty and predictability for litigants in the future.

[14] paragraph 93
[15] paragraph 86
[16] paragraph 87
[17] Paragraph 59
[18] Sharpe J.A. at paragraph 100

Forum Non Conveniens

In contrast to the real and substantial test, the Supreme Court did not alter the traditional *forum non conveniens* test. Rather, the Supreme Court re-enforced the Court of Appeal's view that *forum non conveniens* is a discretionary test that is only applied once jurisdiction is assumed and must remain separate and distinct from the jurisdiction analysis. The Supreme Court added that *forum non conveniens* must be specifically advanced by the defendant relying on it and that defendant bears the onus to show that there is clearly a more appropriate forum for the action.

The Supreme Court found in *Van Breda* that the contract between Club Resorts Ltd. and Viktor Berg was made in Ontario and, thus, a presumptive connecting factor was made out which Club Resorts Ltd. did not rebut. In the *Charron* case, the Supreme Court found that Club Resorts Ltd. was carrying on business in Ontario and assumed jurisdiction on that ground. As a result, both appeals were dismissed.

Conclusion

The Supreme Court of Canada's decision in *Van Breda* significantly advances and clarifies the test for assuming jurisdiction in Ontario. The new test is a much simpler test then the Ontario Court of Appeal's previous approaches in *Muscutt* and *Van Breda*. This new test will allow litigants to determine more easily whether an Ontario court is likely to assume jurisdiction over their dispute. However, there are a number of questions that remain unresolved by this decision and these issues will undoubtedly spawn further litigation.

The Supreme Court limited its four-part test to apply to torts committed outside the province. There are obviously a number of other causes of action that arise outside of the province and it is not clear at this time what test will apply to those causes of action. Moreover, arriving at its decision, the Supreme Court of Canada conflated the traditional presence-based jurisdiction analysis (residence and domicile) with the real and substantial connection test. It appears that the two tests have now been integrated into one analysis. This methodology is inconsistent with more traditional analysis that has three separate pillars for assuming jurisdiction: presence based jurisdiction, consent based jurisdiction and real and substantial connection.

Furthermore, the presumptive ground of carrying on business will need to be clarified in the future. The Supreme Court of Canada gave some helpful guidance as to some of the indicators

of carrying on business. This is an important issue in an increasingly globalized society in which companies often carry on some business in many different parts of the world. The extent to which carrying on business in Canada will lead to a finding of jurisdiction against a foreign company will be a critical question. Moreover, this will have a carry-over affect in terms of Ontario courts enforcing foreign judgments against Ontario business that carry on business abroad. The principles of comity dictate that the same standard for assuming jurisdiction will be used in recognizing and enforcing foreign judgments.

Lastly, the language "connected with the dispute" as a presumptive connecting factor of "any contract connected with the dispute was made in Ontario" will require further judicial interpretation. What does this phrase mean? Does it mean that any factual pattern involving a contractual chain having its genesis in Ontario will now be the subject to Ontario courts' jurisdiction? Surely this is not what the Supreme Court of Canada intended.

In conclusion, in *Van Breda*, the Supreme Court fleshed out the real and substantial connection test. However, work remains to arrive at a clear and comprehensive framework for the assumption of jurisdiction by Canadian courts.