CITATION: Van Breda v. Village Resorts Limited, 2010 ONCA 84
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COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Weiler, MacPherson, Sharpe and Rouleau JJ.A.

BETWEEN

Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda

Plaintiffs (Respondents)

and

Village Resorts Limited, Superclubs International Ltd., Club Resorts Ltd., Rene Denis and Sport au Soleil

Defendants (Appellants)

AND BETWEEN

Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased, the said Anna Charron, personally, Jennifer Candace Charron, Stephanie Michelle Charron and Christopher Michael Charron

Plaintiffs (Respondents)

and

Bel Air Travel Group Ltd., Hola Sun Holidays Limited, Village Resorts International Ltd., carrying on business as Superclubs Breezes Costa Verde. Club Resorts, Ltd., Gaviota SA (Ltd.), Marina Gaviota, Leonardo Vega Ricardo and Andreas Oscar Sanchez Ricardo

Defendants (Appellant)

John A. Olah, for the appellant, Club Resorts Ltd. in Van Breda

Peter J. Pliszka and Robin P. Roddey, for the appellant, Club Resorts Ltd. in Charron

Chris G. Paliare, Robert A. Centa and Tina H. Lie, for the respondents, in Van Breda

Jerome R. Morse, John Adair and Lori Stoltz, for the respondents, in Charron

Howard Borlack, Lisa La Horey and Sabine Kharabian, for the respondent, Bel Air Travel Group Ltd.

Catharine H. Buie, for the respondent, Hola Sun Holidays Ltd.

John Terry and Charles W. Finlay, for the intervener The Tourism Industry Association of Ontario

Allan Rouben, for the intervener Ontario Trial Lawyers Association

Heard: October 5 and 6, 2009

On appeal from the order of Justice L.A. Pattillo of the Superior Court of Justice dated July 3, 2008, with reasons reported at 60 C.P.C. (6th) 186, and the from the order of Justice G.M. Mulligan of the Superior Court of Justice dated October 10, 2008, with reasons reported at 92 O.R. (3d) 608.

Sharpe J.A.:

[1] These appeals involve the issue of when Ontario courts should assume jurisdiction over out-of-province defendants. Both cases involve claims for personal injury damages occasioned as a result of accidents suffered by Canadian tourists at resorts in Cuba. In both matters, the motion judges found that Ontario should assume jurisdiction against the out-of-province defendants. When the cases were first argued, the appellants did not challenge the test for assumed jurisdiction laid down by this court in the "*Muscutt* quintet": *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.); *Leufkens v. Alba Tours*

International Inc. (2002), 60 O.R. (3d) 84 (C.A.); *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76 (C.A.); *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.). The court subsequently directed that a five judge panel be established to permit us to reconsider the *Muscutt* test. On the re-argument, the appellants, supported by one intervener, submitted that we should essentially abandon the *Muscutt* test in favour of an approach based on the Uniform Law Conference model *Court Jurisdiction and Proceedings Transfer Act ("CJPTA*") and refuse jurisdiction. The respondents, supported by another intervener, essentially supported retention of a modified *Muscutt* test, and submitted that they satisfy the appropriate jurisdictional standard.

FACTS

I. Charron

[2] In January 2002, Claude Charron and his wife, the respondent Anna Charron, visited the Barrie office of the appellant Bel Air Travel Group Ltd., a travel agency which offers all-inclusive vacation packages to Cuba and other Caribbean destinations. The couple had decided to take a vacation to the Caribbean so that Claude could engage in scuba diving, having recently been certified as a scuba diver.

[3] The Bel Air representative recommended Cuba as a good place for scuba diving and provided the Charrons with a brochure from the appellant Hola Sun Holidays Ltd., an Ontario tour operator offering fixed-price vacation packages to Cuba. The brochure listed scuba diving as an included feature of an all-inclusive package at Breezes Costa

Verde, a Cuban resort described as a "SuperClubs gem". This resort was owned by Gaviota SA (Ltd.), a Cuban company. Club Resorts Ltd. ("CRL"), incorporated in the Cayman Islands, manages Breezes Costa Verde on behalf of Gaviota, and is responsible for training, motivation, and direction of staff and for promoting and marketing the resort internationally. CRL also has an agreement with Hola Sun pursuant to which CRL provides resort accommodation to Hola Sun for inclusion in package tours for sale to tourists such as the Charrons.

[4] CRL is part of the SuperClubs group of companies. It is incorporated and has its head office in the Cayman Islands. Village Resorts International Ltd., (according to the statement of defence, a misnomer for VRL International) another SuperClub entity, owns trademarks, including "Breezes" and "SuperClubs"; pursuant to a license agreement, these brands are used by CRL in connection with inclusive vacation holidays at resorts it manages, promotes and markets, including Breezes Costa Verde.

[5] The one-week all-inclusive package for two at Breezes Costa Verde that the Charrons purchased through Bel Air and from Hola Sun included scuba diving at the resort. The Charrons arrived at the resort on February 8, 2002. On February 11, Claude went scuba diving without incident. The following day, however, Claude died during his dive.

[6] The respondent members of the Charron family brought an action based on breach of contract and negligence on behalf of the estate of Claude Charron and also on their own behalf pursuant to provisions of the *Family Law Act*, R.S.O. 1990, c.F.3. The

amended statement of claim (the "statement of claim") names two Ontario defendants, Bel Air, Hola Sun, and several foreign defendants: CRL, Village Resorts International Ltd., Gaviota SA (Ltd.), Marina Gaviota (the provider of scuba diving equipment and personnel), Leonardo Vega Ricardo (recreational diving instructor at the marina), and Andres Oscar Sanchez Ricardo (captain of the diving boat).

[7] For service on out-of-province defendants, the statement of claim alleges that the contract was made in Ontario (rule 17.02(f)(i)) and that the damages sustained from the breach of contract and in tort have been sustained in Ontario (rule 17.02(h)).

[8] CRL and VRL International Ltd brought a motion to dismiss the action against them on the basis that Ontario did not have jurisdiction or, alternatively, to stay the action on the grounds that Ontario was not the most appropriate forum.

II. Van Breda

[9] In early June 2003, the appellants Morgan Van Breda and Victor Berg, who had lived in Toronto since September 2002, travelled from Toronto for a one-week stay at the SuperClubs Breezes Jibacoa resort (the "resort") in Cuba. The trip had been arranged by Berg, a professional squash player, through the appellant Rene Denis who, from his home in Ottawa, operated a web-based business under the name Sport au Soleil. Denis arranged bookings for squash, tennis, and aerobics instructors who agreed to instruct at certain Caribbean resorts for a few hours each day in exchange for accommodation for two people at the resort. Denis had an arrangement with CRL to find instructors for CRL resorts. Berg and Van Breda selected the resort from those indicated as being available

on Sport au Soleil's website and by looking at the websites of the various resorts and SuperClub brochures obtained from travel agents in Ontario.

[10] All the arrangements were made through Denis. Berg paid Denis a fee of US$200. Berg paid for his own airfare and that of his common law spouse Van Breda. After making the arrangements with Denis, Berg received a letter from Denis on letterhead bearing the words "SuperClubs Cuba – Tennis" confirming the dates, providing information on what to do upon arrival at the airport, and outlining Berg's role as a tennis instructor for two one-hour sessions per day at times to be determined by the resort, in exchange for accommodation with a guest in a shared room, including all meals and drinks and transportation to and from the hotel.

[11] Shortly after arriving at the resort, Berg and Van Breda went to the beach, where Berg did some chin-ups using a tubular metal apparatus, variously described as a chin-up bar and a soccer goal. When Van Breda attempted to do chin-ups, the apparatus collapsed, sending her to the ground and collapsing on top of her. Van Breda was seriously injured as a result. She was rendered a paraplegic, has undergone extensive treatment and has suffered serious complications. Because of the injury, Van Breda and Berg did not return to Ontario as they had intended. Shortly after her fall, Van Breda was taken to Calgary, Alberta, the home of her family. She and Berg have since moved to British Columbia, where they currently reside.

[12] The respondents commenced this action in May 2006 for personal injury damages, punitive damages and damages for loss of support, care, guidance and companionship

pursuant to the *Family Law Act*, R.S.O. 1990, c.F.1. The fresh as amended statement of claim (the "statement of claim") names as defendants Denis, Sport du Soleil, SuperClubs International Ltd., CRL and Village Resorts Limited, both controlled by SuperClubs International. The owner of the resort is a Cuban corporation not named as a party to this action. Pursuant to a detailed agreement with the Cuban owner, CRL was solely responsible for the operation and management of the resort, the training and management of the staff, and for advertising and promoting the resort in international markets.

[13] The statement of claim is framed as one for breach of contract and negligence. For purposes of service on the out-of-province defendants, the statement of claim alleges that the contract was made in Ontario (rule 17.02(f)(i)); that the defendants carry on business in Ontario (rule 17.02(p)); that damages were sustained in Ontario (rule 17.02(h)); and that the out-of-province defendants are necessary and proper parties to a proceeding properly brought against another person served in Ontario (rule 17.02(o)).

[14] All defendants moved to dismiss the action for want of jurisdiction or to stay the action on grounds of *forum non conveniens*.

REASONS OF THE MOTION JUDGES

I. Charron

1) Real and Substantial Connection

[15] Noting the guiding principles of order and fairness, set out by the Supreme Court of Canada in *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, the motion judge applied the eight factor *Muscutt* test to determine whether there was a real and substantial connection

between the action and Ontario that could justify the assumption of jurisdiction by the Ontario courts.

(i) The connection between Ontario and the plaintiff's claim

[16] The motion judge noted that Anna Charron resides in Ontario and that her damages for loss of love, care, guidance and companionship pursuant to the *Family Law Act* and damages for loss of future income continue in Ontario. Claude Charron saw the advertisement for the resort in Ontario, and Bel Air booked the vacation through Hola Sun, an Ontario company which had an agreement with CRL to promote the resort to Ontario residents. The motion judge concluded that it could be reasonably argued that a contract was entered into in Ontario not only for the vacation, but also for the constituent parts, including scuba diving. This factor weighed in favour of Ontario assuming jurisdiction.

(ii) The connection between Ontario and the defendants

[17] The motion judge noted that Cuban resorts rely heavily on international markets and that Canada, and Ontario in particular, provides a large portion of the tourists purchasing vacation packages. CRL manages Cuban resorts and has a legal obligation to market them internationally. Hola Sun, in turn, advertises these resorts in Ontario and uses the SuperClubs trademarks to do so. The motion judge found that through the marketing agreement with Hola Sun, CRL has a connection to Ontario.

(iii) Unfairness to the defendant in assuming jurisdiction

[18] The motion judge found that any unfairness to the foreign defendants must be balanced against the unfairness to the plaintiffs. Some witnesses for the defence may

have to come from Cuba, and travel or immigration restraints may make this difficult or impossible. However, alternative arrangements for obtaining evidence could be arranged. On the other hand, the plaintiffs and the other Ontario residents have a number of witnesses in Ontario. The motion judge noted that insurance is a factor mitigating against unfairness to the defendant.

(iv) Unfairness to the plaintiff in not assuming jurisdiction

[19] The motion judge noted that if the trial were to proceed in Cuba, the plaintiffs and their witnesses, as well as the Ontario defendants, would be required to travel there. The expert evidence indicated the availability of a fair trial in Cuba, but the plaintiffs would not have a *Family Law Act*-type claim there. Anna Charron's claim for damages for pain and suffering would also be hampered.

(v) Involvement of other parties to the suit

[20] Both Hola Sun and Bel Air are Ontario corporations who defended the action and brought cross-claims. They oppose the motion of the foreign defendants. The motion judge held that their involvement favoured assuming jurisdiction and distinguished this case from *Leufkens* and *Lemmex*, where the court found that Ontario lacked jurisdiction, on the basis that in those cases the harm suffered did not result from activities covered by a contract made in Ontario but rather as a result of services purchased in the foreign jurisdiction.

(vi) The court's willingness to recognize and enforce a similar judgment against a domestic defendant rendered on the same jurisdictional basis

[21] The motion judge found that since CRL advertised extensively in Ontario through the Hola Sun agreement, marketing to and soliciting Ontario residents to travel to their resort in Cuba, it would be unfair to assert that it has no connection to Ontario and wash its hands of the jurisdiction.

(vii) Whether the case is international or interprovincial in nature

[22] The motion judge noted that as this case is international in nature, assumed jurisdiction is more difficult to justify.

(viii) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[23] The motion judge stated that there are no Cuban treaties, conventions or other such agreements providing for reciprocal enforcement of judgments with Ontario, and that Cuba does not provide for any type of claim comparable to an Ontario *Family Law Act* claim for loss of care, guidance and companionship. The motion judge also noted that CRL and Village Resorts International Ltd. are not Cuban companies and that if the plaintiffs were forced to litigate there, they would have to take further steps to have the judgment enforced in the Cayman Islands.

(ix) Conclusion: real and substantial connection

[24] The motion judge concluded that the defendant Village Resorts Limited was a mere licensor of trademarks and that there is no real and substantial connection. The action against Village Resorts International Ltd. was dismissed. With respect to CRL, the motion judge found that Ontario does have jurisdiction to hear the case.

2) Forum Non Conveniens

[25] The motion judge noted the ongoing damages in Ontario, the location of witnesses in Ontario and Cuba, the availability of experts on Cuban law, and the fact that the foreign corporations are not domiciled in Cuba though they argued for a trial there. Most significant was the lack of a *Family Law Act*-type claim if the matter were to proceed in Cuba. Having regard to these factors, the motion judge concluded that Ontario is clearly the most appropriate forum for the dispute.

3) Conclusion

[26] Accordingly, the motion judge dismissed the action against Village Resorts International Ltd. but refused to dismiss or stay the action against CRL.

II. Van Breda

1) Real and Substantial Connection

[27] The motion judge cited and applied the eight factor *Muscutt* test to determine whether there was a real and substantial connection between the action and Ontario to justify the assumption of jurisdiction by the Ontario courts.

(i) The connection between Ontario and the plaintiff's claim

[28] The motion judge found that, based on the statement of claim, there was an arguable case that the plaintiffs' agreement to attend the resort was entered into in Ontario and that Denis was acting "in part at least" as Club Resort's agent for the purpose of arranging their visit to the resort. As the plaintiffs did not return to Ontario, no damage was suffered in Ontario, although in cross-examination Van Breda testified that had the accident not occurred, they would have returned to and remained in Ontario. The

motion judge concluded that despite the fact that the plaintiffs had ceased to be Ontario residents and had suffered no damage in Ontario, there was a good arguable case that the agreement was entered into in Ontario, and that this established "a significant connection between the plaintiffs claim and Ontario".

(ii) The connection between Ontario and the defendants

[29] The motion judge found that there was no evidence that SuperClubs International had any involvement in or connection to Ontario. Likewise there was no evidence that Village Resorts Limited had any direct interest in the resort or that it was involved in any aspect of its management or operations. However, CRL had entered into various agreements with Ontario tour operators and CRL had the arrangement with Denis. While he did not consider the tour operator agreements to be sufficient to constitute a significant connection with Ontario, the motion judge found that CRL's arrangement with Denis in actively seeking professional instructors in Ontario and the contract it entered with Berg through Denis constituted "a significant connection between CRL and Ontario in connection with the claim being advanced by the plaintiffs, giving rise to a strong basis for assuming jurisdiction against it".

(iii) Unfairness to the defendant in assuming jurisdiction

[30] The motion judge gave little weight to the submission that the assumption of jurisdiction by Ontario would be unfair to the defendants. The *Muscutt* quintet recognized the unfairness in Ontario assuming jurisdiction against foreign service providers in the tourism industry who confine their activities to their home jurisdiction. However, by entering into its arrangement with Denis, CRL had not confined its

activities to Cuba. The motion judge found that the difficulties the defendants would face in having witnesses testify in Ontario were not insurmountable. Moreover, the fact that the defendants had obtained liability insurance to protect them if sued in other jurisdictions indicated that they were aware that their activities could involve them in lawsuits in foreign jurisdictions, including Canada.

(iv) Unfairness to the plaintiff in not assuming jurisdiction

[31] The motion judge found that while no other Canadian jurisdiction was available to the plaintiffs, they could sue in Cuba provided they joined the Cuban company that owned the resort. However, the motion judge expressed the concern that the communist regime in Cuba may exercise undue control over the judicial system, thereby creating uncertainty with respect to the fairness of the Cuban legal system. The motion judge concluded that "the balance of fairness debate tips in favour of the plaintiff".

(v) Involvement of other parties to the suit

[32] The motion judge found that as the core of the plaintiffs' action was the claim against the foreign defendants, the involvement of Denis and Sport au Soleil did not strengthen the case for assumed jurisdiction against the foreign defendants.

(vi) The court's willingness to recognize and enforce a similar judgment against a domestic defendant rendered on the same jurisdictional basis

[33] As CRL did not confine its activities to Cuba, the motion judge found that the assumption of jurisdiction would not set a standard that did not already exist in Ontario and elsewhere.

(vii) Whether the case is international or interprovincial in nature

[34] As the moving parties were all foreign defendants, the motion judge found that this factor weighed against assumption of jurisdiction.

(viii) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[35] No evidence was led as to the rules of jurisdiction, recognition or enforcement in any other relevant foreign jurisdiction and, accordingly, the judge gave no weight to this factor.

(ix) Conclusion: real and substantial connection

[36] The motion judge concluded that the balance favoured Ontario assuming jurisdiction against CRL given its connection with Ontario and the subject matter of the action, but that jurisdiction should not be assumed against the other two foreign defendants.

[37] Denis and Sport au Soleil do not appeal the motion judge's finding that as they were resident in Ontario and had been served in Ontario, the real and substantial connection test did not apply and the court had jurisdiction over them.

2) Forum non conveniens

[38] The motion judge considered the evidence regarding what witnesses would be called and what issues would be litigated. The motion judge concluded that it could not be said that Cuba was clearly a more appropriate jurisdiction to try the action than Ontario and accordingly dismissed the defendants' *forum non conveniens* motion.

3) Conclusion

[39] Accordingly, the motion judge dismissed the action against Village Resorts Limited and SuperClubs International Ltd. and refused to dismiss or stay the action against CRL, Rene Denis and Sport au Soleil.

ISSUES

[40] The following three issues arise on these appeals brought by CRL against the decisions refusing to dismiss the actions for want of jurisdiction or to stay the actions on grounds of *forum non conveniens*:

(1) Should the *Muscutt* test for assumed jurisdiction against out-of-province defendants be retained, revised or abandoned in favour of some other test?

(2) Should Ontario assume jurisdiction under the appropriate test for assumed jurisdiction in the circumstances of these cases?

(3) If there is jurisdiction, did the motion judges err in refusing to grant a stay on grounds of *forum non conveniens*?

ANALYSIS

Should the Muscutt test for assumed jurisdiction against out-of-province defendants be retained, revised or abandoned in favour of some other test?

I. The Muscutt test

[41] The *Muscutt* quintet all dealt with claims for damages sustained in Ontario as a result of torts committed outside the province. *Muscutt* reflected an attempt to guide the courts in determining when jurisdiction should be assumed against an extra-provincial defendant in such cases, in light of the significant changes brought about by *Moran v.*

Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393, and a series of seminal judgments that rewrote the law of jurisdiction and enforcement of judgments.

[42] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Hunt* laid down, for the first time, a common law test for assumed jurisdiction and enforcement of foreign judgments based on the idea of "real and substantial connection" and respect for the principles of "order and fairness". The reach of provincial jurisdiction against extra-provincial defendants was limited to cases that met the "real and substantial connection" test, and also required the courts of one province to recognize and enforce judgments of another province where the jurisdiction asserted by that other province satisfied the real and substantial connection test. In *Beals v. Saldhana*, [2003] 3 S.C.R. 416, the Supreme Court held that the real and substantial connection test also applied to the recognition and enforcement of foreign judgments. *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, overruled the long-standing choice of law for tort cases that gave the law of the forum prominence, and introduced the rule that tort cases are to be decided on the basis of the law of the place where the tort was committed. *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, elaborated the doctrine of *forum non conveniens*, the discretionary power of the courts to decline to exercise jurisdiction where the case is more appropriately dealt with in another jurisdiction.

[43] As we noted in *Muscutt*, at paras. 36-37, in these cases, the Supreme Court of Canada described the real and substantial connection test in deliberately general language

to allow for flexibility in its application. In *Tolofson*, at p. 1049, the Court described a real and substantial connection as "a term not yet fully defined". In *Hunt*, at p. 325, the Court observed that *Morguard* had not defined "[t]he exact limits of what constitutes a reasonable assumption of jurisdiction" and added that "no test can perhaps ever be rigidly applied" as "no court has ever been able to anticipate" all the possible circumstances. The Court added that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction" and that "the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections". To the same effect is the more recent decision in *Pro-Swing v. Elta Golf Inc*. [2006] 2 S.C.R. 612, at para. 21, stating that the real and substantial connection test "is flexible and its formulation has allowed it to be applied to various evolving circumstances." See also *Castillo v. Castillo*, [2005] 3 S.C.R. 870, at para. 45, per Bastarache J.:

> The flexibility of the approach used to determine jurisdiction is reflected in the unanimous decision of the Ontario Court of Appeal in *Muscutt*, which identifies the factors which ought to be considered...These factors are not strictly concerned with the connection of the forum to the parties and the cause of action. Instead, these factors reflect important policy considerations such as fairness, comity and efficiency.

[44] These pleas for flexibility echo Dickson J.'s comments in *Moran*, at p. 408, that it would be "unnecessary, and unwise, to have resort to any arbitrary set of rules" for jurisdiction and that an "arbitrary and inflexible" approach is to be avoided.

[45] However, the need for order and predictability necessarily imposes limits on flexibility and an important feature of *Morguard*, *Hunt* and *Tolofson* was the insistence upon jurisdictional restraint and order as well as fairness. *Morguard* held, at p. 1103, that "fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction". *Tolofson*, at p. 1049, described one effect of the real and substantial connection test as being "[t]o prevent overreaching" and "preventing a court from entering into matters in which the jurisdiction in which it is located has little interest".

[46] In *Muscutt*, it was against this background that, at paras. 75-76, we concluded as follows:

> It is apparent from *Morguard*, *Hunt* and subsequent case law that it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.
>
> But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative. Rather, all relevant factors should be considered and weighed together.

[47] We then laid down the now familiar eight factors to be used to determine whether there was a real and substantial connection sufficient to support the assumption of jurisdiction in such cases:

> 1) The connection between the forum and plaintiff's claim;
>
> 2) The connection between the forum and 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.

[48] We pointed out, at paras. 42-43, the importance of distinguishing the real and substantial connection test from the *forum non conveniens* doctrine:

> While the real and substantial connection test is a legal rule, the *forum non* conveniens test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the *forum non conveniens* test is a discretionary test that focuses upon the particular facts of the parties and the case. The question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant.

[49] At para. 41, we described the different list of factors used to assess a claim of *forum non conveniens*:

> Courts have developed a list of several factors that may be considered in determining the most appropriate forum for the action, including the following:
>
> - the location of the majority of the parties

- the location of key witnesses and evidence
- contractual provisions that specify applicable law or accord jurisdiction
- the avoidance of a multiplicity of proceedings
- the applicable law and its weight in comparison to the factual questions to be decided
- geographical factors suggesting the natural forum
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court

II. Post-*Muscutt developments*

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

[51] First, the *Muscutt* quintet all dealt with assumed jurisdiction in cases where the link to Ontario was "damages sustained within the jurisdiction". However, it has been assumed that the *Muscutt* test has wider application, and the eight factor test has been routinely used to assess real and substantial connection in all cases of assumed jurisdiction. We now have a very significant body of experience and case law that can be used to gauge the workability and appropriateness of the *Muscutt* test in cases across a wider range of fact situations. As Vaughan Black and Mat Brechtel aptly put it in "Revising *Muscutt*: The Ontario Court of Appeal Takes Another Look" (2009) 36 Adv.

Q. 35, at p. 36, "It is not surprising that after seven years in the trenches *Muscutt* would be due for a tune-up."

[52] Second, since *Muscutt*, there have been other developments in the jurisprudence, namely, the decisions of the Supreme Court of Canada in *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., [2002] 4 S.C.R. 205, dealing with assumed jurisdiction on the basis of damages sustained within the jurisdiction under the *Civil Code of Quebec*, S.Q. 1991, c. 64, and *Beals* dealing with the recognition and enforcement of foreign judgments. *Muscutt* has also been considered by appellate courts in other provinces and was referred to by the Supreme Court of Canada in *Castillo.* While the *Muscutt* test has generally been followed and applied, it has not escaped criticism in the case law: see e.g. *Coutu v. Gauthier (Estate)* (2006), 264 D.L.R. (4th) 319 (N.B.C.A.) ; *Black v. Breeden* (2009), 309 D.L.R. (4th) 708 (S.C.J.)

[53] Third, the Uniform Law Conference of Canada has developed a model *Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*"), together with another model act on the enforcement of judgments. These model acts are intended to implement uniform statutory rules by which all Canadian courts establish jurisdiction over particular proceedings. *CJPTA* has been adopted in four Canadian jurisdictions. The first to enact it (with minor modifications) was Saskatchewan: *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1. Next was the Yukon Territory (also with minor modifications): *Court Jurisdiction and Proceedings Transfer Act*, S.Y. c. 64 a. 3136. Nova Scotia and British Columbia have also adopted *CJPTA*: *Court Jurisdiction and*

Proceedings Transfer Act, S.N.S. 2003, c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. In addition, the Alberta Law Institute in its Report No. 94, 2008, *Enforcement of Judgments* recommends enactment of ULCC package of acts, including the *Uniform Court Jurisdiction and Proceedings Act*, as does the Manitoba Law Reform Commission Report 119, 2009 (both with some modifications). The Ontario Law Commission is currently studying the issue and has published a consultation paper: *Reforming the Law of Crossborder Litigation: Judicial Jurisdiction* (March, 2009). The appellants urge us to adopt the test for jurisdiction prescribed by *CJPTA*.

[54] Fourth, since *Muscutt* was decided, the concept of "forum of necessity" or "forum of last resort" has emerged as a significant jurisdictional doctrine. This doctrine allows the forum to take jurisdiction in cases despite the absence of a real and substantial connection where there is no other forum in which the plaintiff could reasonably seek relief. "Forum of necessity" is recognized by Article 3136 of the Quebec *Civil Code*, incorporated in s. 6 of *CJPTA*, adopted by both the EU and the UK, and was hinted as a possible basis for jurisdiction by this court in *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.), at paras. 36-38: see also Janet Walker, "*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" (2009) 48 C.B.L.J. 135. The appellants submit that the *Muscutt* test was formulated so that the reach of assumed jurisdiction was wide enough to accommodate certain extraordinary cases where plaintiffs cannot present their case elsewhere. As these cases can now be dealt with

directly through the forum of necessity doctrine, they argue that a narrower test for assumed jurisdiction may safely be applied to other cases.

[55] Fifth, the *Muscutt* test has been critically assessed by a number of legal scholars in academic articles: see 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; 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; Joost Blom, Q.C. & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 U.B.C. L. Rev. 373; Cheryl D. Dusten and Stephen G.A. Pitel, "The Right Answers to Ontario's Jurisdictional Questions: Dismiss, Stay or Set Service Aside" (2005) 30 Adv. Q. 297; Elizabeth Edinger, "*Spar Aerospace*: A Reconciliation of *Morguard* with the Traditional Framework for Determining Jurisdiction" (2003) 61 *Advocate* 511; Janet Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet" (2002) Ann. Rev. of Civil Lit. 61.

[56] This extensive body of writing provides us with a wide range of assessments of the *Muscutt* test from experts in the field that we can and should take into account along with

the experience reflected by the case law. Many scholars who have written on the subject have expressed disagreement with the *Muscutt* test. These criticisms of *Muscutt* arise from what many legal scholars perceive to be undue complexity and lack of predictability in the eight factor test. These concerns may be summarized as follows:

1) the *Muscutt* test is too subjective and confers too much discretion on motion judges;
2) the eight-part test is too complicated and too flexible and therefore leads to inconsistent application;
3) there is too much overlap of the test for jurisdiction with the test for *forum conveniens*;
4) a clearer, more black-letter test should be applied to foster international trade and to avoid the cost and delay of preliminary skirmishing over jurisdiction;
5) the *Muscutt* test allows ill-defined fairness considerations to trump order in an area of the law where order should prevail;
6) the *Muscutt* framework, and especially the fairness factor, is susceptible to forum shopping, threatening to cause an influx of litigants to Ontario;
7) lack of predictability and certainty increases litigation costs and jurisdictional motions can be used as dilatory tactics to impede meritorious claims;
8) it is wrong to look to foreign court practice as a model for appropriate assertion of jurisdiction.

[57] On the other hand, some scholars support *Muscutt.* These commentators argue that:

1) the eight-part *Muscutt* test is consistent with the overriding principles of order *and* fairness laid out by the Supreme Court of Canada in *Morguard* and *Hunt* and no Supreme Court of Canada jurisprudence has called *Muscutt* into question;

2) the real and substantial connection test, as interpreted in *Muscutt*, properly balances fairness to the plaintiff against fairness to the defendant, as required by *Morguard*;

3) the criticism that *Muscutt* leaves too much discretion to the motion judge and yields unpredictable results is unjustified. Given the range and diversity of cases that come before the courts, the search for certainty is illusory and some degree of uncertainty is unavoidable unless we were to adopt an inflexible, "bright line" test, like the "place of acting" theory rejected 35 years ago: see *Moran;*

4) moving some of the *Muscutt* factors out of "real and substantial connection" and into *forum non conveniens* would lead to more, not less, discretion and uncertainty because *forum non conveniens* is explicitly more discretionary that the test for jurisdiction *simpliciter*.

[58] It is against this background of post-*Muscutt* legal developments that I proceed to consider the submissions of the parties and interveners.

III. The CJPTA model

[59] The appellants and the intervener Tourism Industry Association of Ontario urge us to adopt a common law test modelled on *CJPTA*.

[60] As *CJPTA* represents a significant effort to restate and update the modern Canadian law of jurisdiction, and given the importance attached to it by the appellants, it is appropriate to consider its purpose and operation in some detail. For convenience, I have attached the text of the key provisions of *CJPTA* relevant to this appeal as Appendix A to these reasons.

[61] The Drafters' Introductory Comments state the four main purposes of *CJPTA*:

> 1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;
>
> 2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard* and *Amchem;*
>
> 3) by providing a uniform jurisdictional standard, to provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform *Enforcement of Canadian Judgments Act*; and
>
> 4) to provide, for the first time, a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.

[62] The transfer provisions are an important feature of *CJPTA*, but as they do not bear directly on the issues raised on this appeal, I do not propose to review their operation in detail.

[63] In order to achieve the first three purposes, s. 3 sets out five grounds for the assertion of jurisdiction against a person, namely:

> 1) the person is the plaintiff and the proceeding in question is a counterclaim;
>
> 2) the person has submitted to the jurisdiction;
>
> 3) the person has agreed that the court has jurisdiction;
>
> 4) the person is ordinarily resident in the jurisdiction at the time of the commencement of the proceeding;
>
> 5) there is a real and substantial connection between the jurisdiction and the facts on which the proceeding is based.

[64] With the exception of point 4, which replaces residence at the jurisdiction time of commencement of the proceeding for service of process in the jurisdiction, this catalogue essentially reflects the present state of the common law of jurisdiction as interpreted in

Muscutt. The real and substantial connection test remains the basic governing principle for the assertion of jurisdiction against parties who have not submitted or agreed to the jurisdiction and who do not reside within the jurisdiction.

[65] Section 10 replaces provincial rules of court, such as Ontario's rule 17.02, providing for service of process outside the jurisdiction, with a list of substantive jurisdictional connections that presumptively establish a real and substantial connection for both assumed jurisdiction and recognition and enforcement. The Uniform Law Conference Drafters' Comments indicate that this list is "based on the grounds for service *ex juris* in the rules of court of many provinces". The list of connections is not exhaustive; s. 10 explicitly preserves "the right of the plaintiff to prove other circumstances that constitute a real and substantial connection". Nor is real and substantial connection made out conclusively if the case falls into one of the categories listed; s. 10 merely provides a real and substantial connection is only "presumed to exist" and, as explained by the Drafters' Comments, "[a] defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial".

[66] Another significant feature of *CJPTA* is the "forum of necessity" provision, s. 6, conferring a residual discretion on the court to entertain the proceeding if:

> (a) there is no court outside the jurisdiction in which the plaintiff can commence the proceeding; or
>
> (b) the commencement of the proceeding in a court outside the jurisdiction cannot reasonably be required.

[67] Finally, s. 11(1) purports to codify the doctrine of *forum non conveniens* by providing that a court may decline to exercise jurisdiction "on the ground that a court of another state is a more appropriate forum in which to hear the proceeding" and directing, in s. 11(2), that the court "must consider the circumstances relevant to the proceeding, including":

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[68] In my view, the submissions of the appellants exaggerate both the degree of uncertainty produced by *Muscutt* and the degree of certainty and predictability that would be achieved by adopting *CJPTA.* With regard to the alleged uncertainty produced 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. With regard to the claim that *CJPTA* is more certain and predictable, *CJPTA* retains the real and substantial test as the guiding principle but does not define it. The connecting factors listed in s. 10 are merely presumptive and they are not exhaustive, leaving the issue of real and substantial connection as a matter to be resolved in every case. In cases arising in Nova Scotia and British Columbia, jurisdictions that have

adopted *CJPTA*, the courts have turned to the *Muscutt* factors in order to determine what other circumstances could meet the test: see *Bouch v. Penny (Litigation guardian of)* (2009), 310 D.L.R. (4th) 433 (N.S.C.A.), at paras. 51-54; *Stanway v. Wyeth Canada Ltd.* 2008 BCSC 847, at paras. 80-90; *Cameron v. Equineox Technologies Ltd.* 2009 BCSC 221, at paras. 25-26. Moreover, the s. 10 connecting factors are necessarily cast in general terms. They are not self-applying black-letter rules. Their application requires interpretation and consideration of broad issues of fairness and justice. They do not supersede Dickson J.'s admonition in *Moran* that it would be "unnecessary, and unwise, to have resort to any arbitrary set of rules".

[69] However, I agree that there is much to be gained by paying close attention to the *CJPTA* model in clarifying or modifying the *Muscutt* test. We should not ignore the considerations that led to the adoption of *CJPTA* or the criticism that the *Muscutt* eight factor test is too complicated and difficult to apply. In refining the *Muscutt* test, we can look to *CJPTA* as a worthy attempt to restate and update the Canadian law of jurisdiction. We can adopt certain attractive features of *CJPTA* and, in so doing, bring Ontario law into line with the emerging national consensus on appropriate jurisdictional standards.

IV. Clarifying and Reformulating Muscutt

[70] In my view, it is appropriate to make several clarifications and modifications to the *Muscutt* test in light of the post-*Muscutt* changes to the legal landscape that I outlined earlier in these reasons, and in response to the arguments we have heard in these appeals.

(a) A category-based presumption

[71] The first modification to Muscutt that I would make is modelled on s. 10 of *CJPTA*, which gives presumptive effect to a list of connecting factors drawn and distilled from provincial rules of court for service *ex juris*. I would adopt and apply this approach with reference to rule 17.02.

[72] In *Muscutt*, at para. 51, we adopted a statement from Janet Walker in G.D. Watson & L. Jeffrey, eds., *Holmested and Watson: Ontario Civil Procedure* (Carswell: Toronto, 2001), at p. 17-19, that the grounds outlined in rule 17.02 "provide a rough guide to the kinds of cases in which persons outside Ontario will be regarded as subject to the jurisdiction of the Ontario courts". In my view, there are now several reasons that justify elevating the weight to be given rule 17.02 by saying that, with the exception of subrules 17.02(h) ("damages sustained in Ontario") and (o) ("a necessary or proper party"), if a case falls within one of the connections listed in rule 17.02, a real and substantial connection for the purposes of assuming jurisdiction against the defendant shall be presumed to exist. As with *CJPTA*, s. 10, this presumption would not preclude a plaintiff from proving a real and substantial connection in other circumstances and does not preclude the defendant from demonstrating that, notwithstanding the fact that the case falls under rule 17.02, in the particular circumstances of the case, the real and substantial connection test is not met.

[73] I would make this change to *Muscutt* for the following reasons.

[74] First, it would bring Ontario law into line with one of the central features of *CJPTA* in a manner consistent with the development of the common law. I see s. 10 as a carefully crafted list of connecting factors, based upon a review of existing rules of court across Canada providing for service out of the jurisdiction, that experience has shown ordinarily point to a real and substantial connection sufficient to justify the assumption of jurisdiction. With the exceptions of subrules 17.02(h) and (o), the connecting factors listed in s. 10 of *CJPTA* are very similar to those listed in rule 17.02. *CJPTA* approves those connecting factors as a reliable guide to the propriety of assumed jurisdiction and this court should to do the same with respect to 17.02.

[75] Second, a review of the post-*Muscutt* jurisprudence indicates that virtually all of the cases where it has been found that there is no real and substantial connection involve the connecting factors identified by subrule 17.02(h). The fact that after seven years of litigating the issue there have been very few cases finding no real and substantial connection under the other branches of rule 17.02 suggests that, apart from subrule (h), the connecting factors identified in the rule serve as generally reliable indicators of a real and substantial connection.

[76] Third, there is some support from the jurisprudence for looking to the rules for service *ex juris* as a guide to real and substantial connection. In *Hunt*, La Forest J. stated, at p. 325, that although some of the rules for service *ex juris* "may well require reconsideration in light of *Morguard*, the connections relied on under traditional rules are a good place to start." In *Spar*, at para. 56, Lebel J. stated, with reference to art. 3148, the

provision of the *Civil Code of Quebec* dealing with the jurisdiction of the Quebec courts in civil actions: "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 substantial connection' criterion, at least for the purposes of jurisdiction *simpliciter*." The British Columbia Court of Appeal appears to have treated the cases falling within the rule of court for service *ex juris* as presumptively satisfying the real and substantial connection test: see, eg. *Strukoff v. Syncrude Canada Ltd* (2000), 80 B.C.L.R. (3d) 294 (C.A.), at para. 10.

[77] Fourth, to the extent that giving Rule 17.02 presumptive effect will simplify and reduce the incidence and cost of litigation on the issue of jurisdiction, this change addresses at least in part the concern that the *Muscutt* test is unduly complex and unwieldy.

[78] I would not give subrules 17.02(h) or (o) presumptive effect for the following reasons. The fact that neither is included in s. 10 of *CJPTA* indicates that neither has gained general acceptance as a sufficiently reliable indicator of a real and substantial connection. See also Janet Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet", at pp. 71-74. The "damages sustained" rule was adopted to relieve against the very narrow view taken in the case law of the reach of the rule allowing for service *ex juris* "in respect of a tort committed in Ontario" before that area was liberalized by *Moran.* It is clear from the reasoning and the results in the *Muscutt* quintet that there are many situations where "damages sustained in Ontario" will not serve as a

reliable indicator of a real and substantial connection. In my view, this position is not changed by *Spar*, which dealt with injurious acts committed outside Quebec that caused damages within Quebec and not the *Muscutt* situation where a plaintiff was injured outside the forum and then came to the forum and subsequently suffered damages: see Janet Walker, "Must there be Uniform Standards for Jurisdiction within a Federation?" (2003), 119 L.Q.R. 567, at p. 570.

[79] With respect to rule 17.02(o), given the very generous scope of Rule 5 for the joinder of parties, the fact that a foreign defendant qualifies as a "necessary *or* proper party" to a proceeding is not, by itself, a reliable indicator that there is a real and substantial connection to support the assertion of jurisdiction over that defendant. The *CJPTA* Drafters' Comment to section 10 is apposite:

> [S]uch a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction. If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present.... Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person. The proceeding against the second person will have to meet the real and substantial connection test.

[80] I emphasize, however, that I disagree with the appellant's suggestion that plaintiffs should essentially be confined to the enumerated categories. That is not the case under *CJPTA* and to impose such a limit would be inconsistent with the entire thrust of the

jurisprudence I have already reviewed emphasizing the need for flexibility in this area of law.

(b) The importance of distinguishing real and substantial connection and forum non conveniens

[81] I agree with the observation made in argument and in the academic literature that since *Muscutt* was decided, there has been a tendency to obscure the distinction between jurisdiction *simpliciter* and *forum non conveniens* and to merge considerations pertaining to *forum non conveniens* into the real and substantial connection analysis. In part, this tendency is a product of the unduly wide interpretation given in some cases to fairness (*Muscutt* factors 3 and 4), a topic to which I will return below.

[82] I would reiterate what we said in *Muscutt*: there is a clear distinction to be drawn between legal jurisdiction *simpliciter* and the discretionary test for *forum non conveniens*. The factors to be considered are different and distinct. In order to maintain the necessary degree of certainty and clarity, it is important to maintain and respect the distinction between the two tests. In particular, 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. The test for jurisdiction *simpliciter* is whether there is *a* real and substantial connection, an inquiry that does not turn upon a comparison with the strength of the connection with another potentially available jurisdiction.

(c) Refining and simplifying the Muscutt test

[83] With the experience gained from the substantial volume of case law applying *Muscutt*, with the perspective offered by the extensive body of scholarly writing on the *Muscutt* test, and with the benefit of the very thorough arguments we have heard in these appeals, it is now possible and appropriate to refine and to simplify the test. I recognize that one of the shortcomings of the *Muscutt* test is that it provided little or no guidance on the relationship between the eight factors or as to the relative weight or significance each factor should bear. I think that it is now possible to simplify the test and to provide for more clarity and ease in its application. I will do this by reviewing each of the eight *Muscutt* factors, not to reinforce their continued application, but to explain the manner in which I would elaborate a new refined test.

(i) The core of the test: the connection between the forum, the plaintiff's claim and the defendant

[84] 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.

[85] As we explained in *Muscutt*, at para. 36, the Supreme Court of Canada has rejected the notion that there is a precise or mechanical test to define the nature or degree of connections required. In *Morguard*, at pp. 1104-1109, the Court variously described a real and substantial connection as 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*" (emphasis added).

[86] I see no reason to depart from what we said in *Muscutt*, at paras. 54-74, in rejecting the argument that assumed jurisdiction should focus solely or primarily upon the nature and extent of the *defendant's* contacts with the jurisdiction. We concluded, at para. 74, that "[w]hile the defendant's contact with the jurisdiction is an *important* factor, it is not a *necessary* factor". A personal subjection test based exclusively on the defendant's contacts would be unduly restrictive, would fail to pay adequate heed to the interests of the injured plaintiff, would be inconsistent with a substantial body of case law reviewed in *Muscutt*, at paras. 63-74, and would be contrary to the Supreme Court of Canada's emphasis on the need for flexibility. It would also be inconsistent with *CJPTA*, s. 3(e), which confers jurisdiction if "there is a real and substantial connection between the [forum] and the facts on which the proceedings against that person is based."

[87] As we put it in *Muscutt*, at para. 77, when explaining the importance of defining the real and substantial connection test broadly enough to embrace consideration of the connection between the forum and the plaintiff's claim:

> The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors. In *Moran v. Pyle* at p. 409, Dickson J. spoke of "the important interest a state has in injuries suffered by persons within its territory". The *Moran* decision and the introduction of the "damage sustained" rule

> in 1975 were both motivated by the perception that the interests of justice required a more generous approach to assumed jurisdiction. The connection between the forum and the plaintiff's claim is therefore relevant.

[88] Accordingly, I would maintain the connection between the plaintiff's claim and the forum as a core element of the real and substantial connection test.

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

[90] I am not persuaded by the submission of the *Charron* respondents that *Muscutt* reads *Moran* too narrowly and that jurisdiction should be assumed over a defendant who ought to reasonably have contemplated being called upon to account in the forum. It is difficult to see how a proposition stated that broadly could avoid subjecting anyone who has regular dealings with extra-provincial parties from rendering themselves subject to the home jurisdiction of the extra-provincial customer. In *Sinclair*, we dealt with restaurant owners who regularly do business with extra-provincial customers. I see no reason to depart from what we said at para. 21:

> Restaurant owners and operators deal with customers who are traveling away from home on a regular and routine basis. To require restaurant owners and operators to litigate the claims of customers wherever they reside would impose a heavy burden that is difficult to justify under the principles of order and fairness expressed in *Morguard* and *Hunt*. Travelers from all corners of the earth might choose to dine in any Ontario restaurant. Absent special circumstances, to require Ontario restaurant owners and operators to defend their conduct in the home jurisdictions of their customers would impose an undue and unreasonable burden on them. If Ontario courts are not prepared to impose that burden on Ontario restaurant owners and operators, we should also refuse to assume jurisdiction against foreign restaurant owners and operators sued by Ontario residents for consequential damages resulting from a tort committed outside the province.

[91] Accordingly, I would maintain the distinction made in *Muscutt*, at para. 83, between the degree of foreseeability motivating *Moran* and the situation where a wrongful act and injury occur outside the jurisdiction and the plaintiff returns home and continues to suffer consequential damage. The fact that it was foreseeable that a visiting plaintiff will return home and continue to suffer damages from the injury does not, by itself, make the defendant subject to the plaintiff's home jurisdiction under the *Moran* principle.

[92] On the other hand, acts or conduct short of residence or carrying on business will often support a real and substantial connection. As stated in *Beals*, at para. 32, "a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction."

(ii) Fairness

[93] *Morguard* and *Hunt* rewrote the law of jurisdiction in terms of both "real and substantial connection" and in terms of "order and fairness". The two concepts are correlative and inextricably related. As stated in *Hunt*, at p. 326, the assumption of jurisdiction "must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections". As we stated in *Muscutt*, at para. 86, proper consideration of the defendant's position cannot be accomplished simply by looking at the acts or conduct that would render the defendant subject to the jurisdiction. The quality, strength or significance of those contacts cannot be assessed in a purely mechanical fashion. The inquiry necessarily entails consideration of the fairness or unfairness of asserting jurisdiction against the defendant in light of those contacts. As the Nova Scotia Court of Appeal held in *O'Brien v. Canada (Attorney General)* (2002), 201 N.S.R. (2d) 338, at para. 20, leave to appeal to S.C.C. denied [2002] SCCA No. 155:

> The concept of order and fairness is integral to the question of determining whether there is a real and substantial question…[and] 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 question…

[94] See also *Bouch*, at para. 51:

> …I reject the suggestion that considerations of fairness have no place in the inquiry into the existence of a real and substantial connection, and are only to be weighed during the application of the discretionary *forum non conveniens* doctrine. In my respectful view, such a prohibition would introduce an unnecessary and unrealistic rigidity to a test that is clearly designed to be flexible. To impose such a constraint would prevent a judge's assessment of the totality of the

> evidence when deciding whether the circumstances made it proper to accept jurisdiction over the action as framed by the plaintiff.

[95] The principles of order and fairness apply equally to the plaintiff and, as stated in *Muscutt*, at para. 89, the entire thrust of modern jurisprudence, from *Moran* to *Morguard* and beyond, has been to broaden the inquiry beyond the contacts the defendant has with the jurisdiction and to include consideration of fairness to the plaintiff:

> *Morguard* and *Moran* both hold that given the realities of modern commerce and the free flow of goods and people across borders, plaintiffs should not be saddled with the anachronistic "power theory" that focuses exclusively on subjection and territorial sovereignty. Although *Tolofson* dealt with choice of law, at pp. 1071-72, the court also speaks of the need to balance the interests of the plaintiff and defendant. Further, in *Oakley v. Barry*, [(1998), 166 N.S.R. (2d) 282, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 282] Pugsley J.A. held at p. 699 that "[t]he concept of fairness in determining jurisdiction should be considered from the point of view of both the respondent [plaintiff], as well as the appellants [defendants]". I agree that it is important to consider fairness to the plaintiff and to balance this against fairness to the defendant.

[96] I would, therefore, maintain consideration of the fairness of assuming or refusing jurisdiction as a consideration that bears upon the real and substantial connection test. However, I would explain and clarify what was said in *Muscutt* and limit the extent to which fairness considerations apply in the manner outlined in the following paragraphs.

[97] First, Muscutt factors 3 and 4 should be collapsed into one and the fairness of assuming or refusing jurisdiction should be considered together.

[98] Second, consideration of fairness should not be seen as a separate inquiry unrelated to the core of the test, the connection between the forum, the plaintiff's claim and the defendant. Consideration of fairness should rather serve as an analytic tool 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.

[99] Third, I agree with CRL's submission that unfairness to the plaintiff in not assuming jurisdiction does not amount to an independent factor capable of trumping the want of a real and substantial connection between the forum and the plaintiff's claim and/or the defendant. Moreover, the fact that the foreign defendant is insured against the risk of litigation does not overcome a lack of connection between the claim or the defendant and the forum, and insurance is a matter that is more properly considered in relation to *forum non conveniens*.

[100] The post-*Muscutt* emergence of the forum of necessity doctrine has a direct bearing on this issue. 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.

[101] Fourth, as I have already stated, it is important to maintain the distinction between jurisdiction *simpliciter* and *forum non conveniens*. Consideration of jurisdiction *simpliciter* and the real and substantial connection test must not anticipate, incorporate or replicate consideration of the matters that pertain to the *forum non conveniens* test.

(iii) The relevance of the involvement of other parties to the suit

[102] The involvement of other parties to the suit is not, as *Muscutt* suggests, a factor that needs to be routinely considered in all cases. It remains relevant to the real and substantial connection test, but only in cases where it is asserted as a possible (not a presumptive) connecting factor that may justify assuming jurisdiction. In addition, at the *forum non conveniens* stage, the avoidance of a multiplicity of proceedings remains one of the factors to be considered.

(iv) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

[103] I agree with the submission that the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis should not be treated as a separate factor to be considered and weighed in the balance with the other relevant factors. It remains, however, a general and overarching principle that emerges from the assimilation in *Morguard* and *Hunt* of the rules for jurisdiction over foreign

defendants and the rules for recognition and enforcement of foreign judgments. If a court holds that there is a real and substantial connection sufficient to justify asserting jurisdiction against a foreign defendant, it thereby holds that there would be a real and substantial connection sufficient to require recognition and enforcement of a foreign judgment against an Ontario defendant rendered on the same basis. That is an important general legal principle that disciplines the assumption of jurisdiction against extra-provincial defendants. It is a principle that a court should bear in mind when considering whether to assume jurisdiction against an extra-provincial defendant. If the court would not be prepared to recognize and enforce an extra-provincial judgment against an Ontario defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against the extra-provincial defendant.

(v) Whether the case is interprovincial or international in nature

[104] In *Muscutt*, at paras. 95-99, we cited a number of authorities that state that the assumption of jurisdiction is more easily justified in interprovincial cases than in international cases. In *Morguard*, at pp. 1098 and 1101, La Forest J. stated that the "considerations underlying the rules of comity apply with much greater force between the units of a federal state", that a federation "implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation", and that "the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution." In *Hunt* at p. 323, La Forest J. referred to the distinction drawn in *Aetna Financial Services Ltd. v. Feigelman*,

[1985] 1 S.C.R. 2, at p. 34-35, between interprovincial and international cases for the purpose of *Mareva* injunctions and added "I do not think litigation engendered against a corporate citizen located in one province by its trading and commercial activities in another province should necessarily be subject to the same rules as those applicable to international commerce".

[105] I disagree with the submission that *Beals*, at para. 19, holding that "the 'real and substantial connection' test, which is applied to interprovincial judgments, should apply equally to the recognition of foreign judgments", obliterates the distinction between interprovincial and international cases. In my view, by applying the real and substantial connection test to international judgments, *Beals* does not require that in its precise application in particular cases, the real and substantial connection test will inevitably treat interprovincial and international cases identically. There is nothing in *Beals* that considers or disputes the reasons given in *Morguard*, *Hunt*, *Tolofson* and *Aetna* for applying jurisdictional standards in a manner that takes into account the realities of a federation with a shared legal tradition and integrated economic and social connections. Moreover, that distinction was reiterated by the Supreme Court of Canada in a post-*Beals* decision, albeit in a *forum non conveniens* case, *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, [2009] 1 S.C.R. 321, where the court stated, at para. 30: "A distinction should be made between situations that involve a uniform and shared approach to the exercise of jurisdiction (e.g. inter-provincial conflicts) and those, such as the present

[involving foreign parties], that do not." I conclude, accordingly, that *Beals* does not preclude differential treatment being accorded to interprovincial and international cases.

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

(vi) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[107] Comity and the encouragement of uniformity or reciprocity are general principles that shape the rules of private international law: see *Morguard*, at p. 1096, referring to *Hilton v. Guyot*, 159 U.S. 113 at 163-64 (1895); *Beals*, at paras. 27-29; and *Spar*, at para. 17, describing comity as "a useful guiding principle when applying the rules of private international law". In *Muscutt*, we reviewed the treatment accorded "damages sustained in the jurisdiction" as a result of a tort committed elsewhere as a basis for assumed jurisdiction in several foreign jurisdictions. I reject the surprisingly insular argument made by some scholars that we should ignore foreign law when considering and applying the real and substantial connection test. In my view, it is entirely appropriate to take foreign law into account in an area of law that has such obvious and immediate application to foreign litigants. While I certainly would not insist on the production of evidence of foreign law in every case, I view it as helpful to know how foreign courts

treat like cases when determining the appropriateness of extending the reach of Ontario law against a foreign litigant.

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

V. Reformulating Muscutt: Summary

[109] To summarize the preceding discussion, in my view, the *Muscutt* test should be clarified and reformulated as follows:

- First, the court should determine whether the claim falls under rule 17.02 (excepting subrules (h) and (o)) to determine whether a real and substantial connection with Ontario is presumed to exist. The presence or absence of a presumption will frame the second stage of the analysis. If one of the connections identified in rule 17.02 (excepting subrules (h) and (o)) is made out, the defendant bears the burden of showing that a real and substantial connection does not exist. If one of those connections is not made out, the burden falls on the plaintiff to demonstrate that, in the particular circumstances of the case, the real and substantial connection test is met.
- At the second stage, the core of the analysis rests upon the connection between Ontario and the plaintiff's claim and the defendant, respectively.
- The remaining considerations should not be treated as independent factors having more or less equal weight when determining whether there is a real and substantial connection but as general legal principles that bear upon the analysis.

- Consideration of the fairness of assuming or refusing jurisdiction is a necessary tool in assessing the strengths of the connections between the forum and the plaintiff's claim and the defendant. However, fairness is not a free-standing factor capable of trumping weak connections, subject only to the forum of necessity exception.
- Consideration of jurisdiction *simpliciter* and the real and substantial connection test should not anticipate, incorporate or replicate consideration of the matters that pertain to *forum non conveniens* test.
- The involvement of other parties to the suit is only relevant in cases where that is asserted as a possible connecting factor and in relation to avoiding a multiplicity of proceedings under *forum non conveniens.*
- The willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis is as an overarching principle that disciplines the exercise of jurisdiction against extra-provincial defendants. This principle provides perspective and is intended to prevent a judicial tendency to overreach to assume jurisdiction when the plaintiff is an Ontario resident. If the court would not be prepared to recognize and enforce an extra-provincial judgment against an Ontario defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against the extra-provincial defendant.
- Whether the case is interprovincial or international in nature, and comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere are relevant considerations, not as independent factors having more or less equal weight with the others, but as general principles of private international law that bear upon the interpretation and application of the real and substantial connection test.
- The factors to be considered for jurisdiction *simpliciter* are different and distinct from those to be considered for *forum non conveniens*. The *forum non conveniens*

> factors have no bearing on real and substantial connection and, therefore, should only be considered after it has been determined that there is a real and substantial connection and that jurisdiction *simpliciter* has been established.
>
> - Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

APPLICATION

I. Charron

(1) Should a real and substantial connection be presumed on the ground that the case falls within a connection specified in Rule 17.02?

[110] The plaintiff Anna Charron resides in Ontario and her damages for loss of love, care, guidance and companionship pursuant to the *Family Law Act* and the estate's claim for loss of future income are claims for damages suffered in Ontario as a result of a tort or breach of contact committed elsewhere pursuant to rule 17.02(h). As I have indicated, however, rule 17.02(h) is not one of the rule 17.02 connections that attract presumptive effect.

[111] The plaintiff's claim against CRL also arises directly from the contract the Charrons entered with Hola Sun for a one-week all-inclusive vacation package that included scuba diving at the Breezes Costa Verde resort. The statement of claim alleges "that it was a term of the contract, express or implied, that the late Claude Charron be provided with safe scuba diving instruction and equipment, and that the Defendants, by their conduct, have breached the said contract."

[112] I see no reason to interfere with the motion judge's finding, at para. 21, that it "could reasonably be argued that a contract was entered into in Ontario". All the arrangements were made in Ontario through the respondents Bel Air and Hola Sun, both corporations carrying on business in Ontario.

[113] Although CRL was implicated in the promotion and execution of the contract, CRL was not a party to that contract, and for that reason, I do not view this as a case that triggers the presumptive effect of rule 17.02. Accordingly, it is necessary to consider whether the respondents have otherwise demonstrated a real and substantial connection to support Ontario assuming jurisdiction over CRL.

(2) Did the respondents establish a real and substantial connection?

(i) The connection between the forum and plaintiff's claim

[114] I see no basis upon which to interfere with the motion judge's finding that there is a significant connection between the plaintiffs' claim and Ontario. While not presumptive of a real and substantial connection, damages suffered in the jurisdiction has often been accepted as a significant connection, both in Ontario and in other provinces: see, e.g. *Spar* (Quebec); *Sampson v. Olsen* (2005) 274 Sask. R. 234 (Q.B.), at para. 12; *Bouch*, at para 43 (Nova Scotia); *Oakley*, at para. 95 (Nova Scotia); *Coutu*, at para. 6 (New Brunswick); *Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716 (B.C.C.A.), at p. 722 (British Columbia).

(ii) The connection between the forum and defendant

[115] I see no basis to interfere with the motion judge's finding, at para. 22 of his reasons, that there is a connection between the forum and the defendant:

> CRL manages resorts [in Cuba]. These resorts rely heavily on international travellers. Cubans and Americans, for economic and political reasons, are not the target market for these resorts. These resorts rely on an international market and Canada, and in particular Ontario, provides a large portion of tourists purchasing vacation packages. CRL has a legal obligation to market these resorts internationally. It fulfills its obligation in Ontario by way of an agreement with Hola Sun. Hola Sun, in turn, advertises these resorts in Ontario and uses the authorized VRL [Village Resorts International Ltd] trademarks to market these properties. Therefore, CRL has a connection with Ontario by way of its agreement with Hola Sun.

[116] The issue is the significance of CRL's connection with Ontario under the revised test for assumed jurisdiction elaborated in these reasons. While the evidence may fall short of establishing that CRL was carrying on business in Ontario, for the following reasons, I conclude there is evidence to support a finding that CRL's activities amount to a significant connection with Ontario.

[117] The record reveals that CRL was directly involved in activity in Ontario to solicit business for the resort. Unlike the defendants in *Leufkens*, *Lemmex* and *Sinclair*, CRL did not confine its activities to its home jurisdiction:

- pursuant to its contract with the Cuban hotel owner, CRL was required to and did promote and advertise the resort using the "SuperClubs" brand in Canada;
- CRL relies on maintaining a high profile for the SuperClubs brand in Ontario as residents of Canada

and Ontario represent a high proportion of CRL's target market;

- CRL was licenced to use the "SuperClubs" label and itself "created" the "SuperClubs Cuba" label and used these labels to market the resort in Ontario
- CRL's witness Abe Moore agreed on cross-examination:
  - "that CRL was in the business of carrying out activities in countries such as Canada to generate paying guests of the resort";
  - that to do so CRL had to "either directly or engage others to undertake the activity of solicitation, promotion and advertising" in Canada;
  - that CRL ensured that it had relationships with others to do so in Ontario to satisfy its contractual obligation to promote the resort;
- CRL representatives regularly travel to Ontario to further CRL's promotional activity;
- CRL arranged for the preparation and distribution of promotional materials in Ontario; and
- as outlined in the following paragraph, CRL benefited from an office in Ontario that provided information and engaged in the promotion of the SuperClubs brand.

[118] While CRL itself had no office in Ontario, the SuperClubs brand, used by CRL to promote the resort, is held out in promotional materials as having an office in Ontario. In brochures prepared by CRL for distribution to Ontario residents and in a travel industry publication listing hotel representatives and major hotel chains in Canada, SuperClubs is shown as having Canadian offices at 9019 Bayview Ave., Richmond Hill, phone number 905-771-8664. Nancy Hay is referred to as Director of Sales, Canada. On promotional

materials available from Ontario travel agents, Nancy Hay's name and telephone number appear on these promotional materials and advertisements and she is described as "Contact SuperClubs". The details of Nancy Hay's duties and the nature of her responsibilities are unclear, but there is little doubt that she is part of the promotion of the SuperClubs brand in Ontario and that CRL used and benefited from her presence in Ontario to promote its business. Abe Moore admitted on cross-examination that he visited Nancy Hay at her office to discuss the promotion of CRL's resorts. Hola Sun's witness Andrea Carr testified that "if I had any question about any SuperClubs property" she would call Hay's office and "they would find me the answer". As mentioned below in connection with *Van Breda*, Moore directed Rene Denis to contact Nancy Hay "for assistance with promotions". Abe Moore swore that the work of that office is now conducted by ILI Travel Limited, an Ontario corporation of which he is the president and for which he performs management services under a contract with CRL and that as a result, he now spends three months a year in Ontario.

[119] In my view, one can fairly infer from this body of evidence that although CRL itself maintained no office in Ontario, CRL is implicated in and benefits from the physical presence in Ontario of an office and contact person held out to the public as representing the same "SuperClubs" brand CRL uses to carry on its business of promoting and operating the resort.

[120] In my view, when considered as a whole, this level of activity and presence in Ontario on the part of CRL to promote its business amounts to a significant connection

with Ontario. CRL's situation is readily distinguishable from that of the local service providers in *Lemmex*, *Leufkens* and *Sinclair* who confined their activities to their home jurisdictions.

(iii) Fairness

[121] I respectfully disagree with the way the motion judge dealt with the issue of fairness. In my view, by considering the difficulties the parties would face in arranging for witnesses to testify in either Cuba or Ontario, he conflated the *forum non conveniens* test with the test for real and substantial connection. I will return to consider those factors when I consider the issue of *forum non conveniens*.

[122] However, when I consider the connections between the claim, CRL and Ontario through the lens of fairness to assess their significance and weight in relation to a real and substantial connection, I agree with the motion judge's conclusion that fairness supports the assumption of jurisdiction against CRL. In particular, I see nothing unfair in requiring CRL to defend this action in Ontario. As I have already indicated, CRL actively marketed in Ontario the all-inclusive vacation that the Charrons purchased in a variety of ways. While the contract between CRL and Hola Sun provided for the application of Cuban law and for Cuban jurisdiction in relation to disputes arising between CRL and Hola Sun, that provision has no application to the Charrons.

[123] Accordingly, I agree with the submission that in the light of these connections, and subject to the consideration of *forum non conveniens*, there is nothing unfair about requiring CRL to defend this claim in Ontario.

(iv) General principles

[124] An important discipline on the real and substantial connection inquiry and check on jurisdictional overreaching is to ask whether Ontario would be willing to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis as that being asserted here. In my view, the answer to that question is yes. CRL's activities are far removed from those of a local tourist business – the restaurant owner discussed in *Sinclair* or the much discussed Algonquin canoe renter - that accepts business from out-of-province defendants but essentially confines its activities to Ontario. CRL targeted the Ontario market, it entered into contracts in Ontario with Ontario entities to promote its business, it ensured that printed promotional materials were available to allow Ontario travel agents to sell the products it was promoting, and its interests were fostered by the physical presence in Ontario of a SuperClubs office and contact person. In my view, if an Ontario defendant were to engage in a comparable level of activity in a foreign jurisdiction, Ontario would recognize and enforce a judgment rendered against the Ontario defendant by the courts of that foreign jurisdiction.

[125] I would add, with particular reference to the submission of The Tourism Industry Association of Ontario, that where an Ontario operator targets a particular foreign market and engages in activities likely to attract foreign jurisdiction, it can protect its interests by insisting upon an Ontario choice of law and choice of forum clause in its contracts with foreign visitors.

(3) Forum non conveniens

[126] I would not interfere with the motion judge's rejection of the submission that the action should be stayed on grounds of *forum non conveniens*.

[127] The motion judge found that some defence witnesses would have to travel from Cuba and observed that Cuban travel and immigration restraints might "make their travel to Ontario for a trial difficult or impossible". On the other hand, he noted that there was evidence from an expert on Cuban law that alternative arrangements could be made to take their evidence in Cuba, if the trial were held in Ontario. Moreover, the plaintiffs would have to arrange for the attendance of several physicians and other individuals from Ontario who had been with them when the accident occurred. The motion judge noted that CRL is not domiciled in Cuba and that it is insured against liability in Ontario. While evidence of Cuban law will be required if the action proceeds in Ontario, both parties had already retained Cuban law experts. The action also involves Bel Air and Hola Sun, Ontario corporations named as defendants and who assert cross-claims against CRL, and permitting suit here would avoid a multiplicity of proceedings and the risk of inconsistent results. There is an issue as to whether the plaintiffs will be able to claim under the *Family Law Act* given the *lex loci delicti* rule laid down in *Tolofson*. The motion judge may have oversimplified the discussion of whether such a claim could be made if the action proceeds in Ontario. However, it is clear that such damages would be excluded if the Charrons were forced to sue in Cuba. There are also statements from this court suggesting that, in some cases, claims for *Family Law Act* damages may fall into

the exceptional category mentioned in *Tolofson*: see *Hanlan v. Sernesky* (1998), 38 O.R. (3d) 479 (C.A.); *Wong v. Lee* (2002), 58 O.R. (3d) 398 (C.A.), at para. 16; *Somers v. Fournier* (2002), 60 O.R. (3d) 225, at para. 34.

[128] The *forum non conveniens* decision is discretionary and the motion judge cited and applied the proper legal test. I see no error of principle that would justify appellate intervention.

(4) Conclusion: Charron

[129] Accordingly, I would dismiss the appeal.

II. Van Breda

(1) Should a real and substantial connection be presumed on the ground that the case falls within a connection specified in rule 17.02?

[130] I see no basis to interfere with the motion judge's conclusion that there was "a significant connection between the plaintiffs claim and Ontario" on the basis that the contract was entered into in Ontario. All the arrangements were made through Denis and Sport au Soleil in Ontario. Denis confirmed those arrangements with a letter to Berg, written on the letterhead "SuperClubs Cuba – Tennis", setting out the dates, instructions on how to get to the hotel, and specifying the nature of Berg's duties. The letter specified the terms of Berg's arrangement with the resort: "In exchange for your services the hotel will accommodate you and your guest in a shared room. This also includes all meals and drinks and transportation to and from the Veradero airport." The letter concludes with an

instruction addressed to the Hotel Reception Desk: "The above individual has been confirmed for these dates with the hotel General Manager."

[131] There was no written contract between Denis and CRL, but in my view, it may be inferred from the letter Abe Moore wrote to Denis asking him to find tennis teaching professionals that Denis was acting, as the motion judge put it, "in part at least" as CRL's agent:

> I do not want to do a formal arrangement nor get into a long term arrangement, we just want to be able to find some people who are prepared to teach for a couple of hours each day in exchange for accommodations for two people sharing. I am prepared to compensate you, hopefully in kind, for your efforts.

[132] In his affidavit, Moore described his arrangement with Denis as "an oral contract…whereby Sport au Soleil arranges for the services of various professionals such as the plaintiff, Viktor Berg." Denis used the SuperClubs trademark on his letterhead, he wrote the letter confirming the terms of the arrangement with the resort that CRL operated and he instructed the registration desk at the resort in Cuba that Berg's arrangements were "confirmed". Denis' conduct, including the letter he wrote on Berg and Van Breda's behalf setting out the terms of their contract, was accepted and acted on by CRL, giving rise to an inference of agency. I see no merit in the submission that the motion judge made a palpable or overriding error in finding that Denis was acting "in part at least" as CRL's agent in making these arrangements.

[133] Nor do I see any merit in CRL's submission that there was no binding contract until Berg and Van Breda arrived at and checked in to the hotel. This is not the usual

case where an Ontario resident simply makes a reservation with an out-of-province hotel and then finalizes the details of the contract upon arrival and check-in. Berg made all his arrangements with an Ontario-based entity clothed with the necessary authority to commit the foreign-based hotel to an unusual and specific arrangement for the provision of services in exchange for the provision of accommodation. See *Fordyce v. Round Hill Developments*, 1978 U.S. Dist. LEXIS 19112, where the District Court for the Southern District of New York declined to assume jurisdiction over the defendant owner of a Jamaican hotel as the New York agent of the hotel could not bind the resort by confirming reservations, an ability which could have been sufficient to ground the assumption of jurisdiction over Round Hill on the basis of 'doing business', as interpreted in *Frummer v. Hilton Hotels*, (1967) 19 N.Y.2d 533.

[134] In this case, there was no tour operator standing between the clients and CRL: the contract for the all-inclusive vacation was made directly with CRL. I conclude that, based upon the facts alleged in the pleadings and the evidence led on the motion, the respondents' claim against CRL falls within the connection described in rule 17.02 (f)(i) as a claim "in respect of a contract where…the contract was made in Ontario". I would accordingly hold that a real and substantial connection between the claim and Ontario is presumed to exist.

[135] The claim is framed both in contract and in tort. Arguably, it is more tortious that contractual in nature. However, that does not defeat or minimize the significance of the contract as a significant connection with Ontario. First, there is a strong nexus and

overlap between claims in contract and tort, and there is concurrent liability for negligence arising from contractual relationships. A party is not required to elect between suing in tort or contract; the general rule is that of concurrent liability where a wrong supports an action in both contract and tort: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12. Second, the application of the real and substantial connection test in this context should not turn on a technical characterization of the plaintiff's cause of action. The issue is the significance of the connections of the defendant with Ontario, and CRL cannot escape the fact that the Ontario contract framed its relationship with the plaintiffs. The fact that the claim may sound deeper in tort that it does in contract does not diminish the significance of the contract as establishing between CRL and the plaintiffs a significant connection that was formed in Ontario.

[136] As this presumption is not conclusive, it remains open to CRL to demonstrate that in the particular circumstances of the case, the real and substantial connection test is not met. I will now consider whether, on the facts of this case, CRL has rebutted that presumption under the revised test for real and substantial connection

(2) Has the appellant rebutted the presumption of a real and substantial connection?

(i) The connection between the forum and plaintiff's claim

[137] It is conceded that the respondents have suffered no damages in Ontario. On the other hand, Van Breda and Berg were residents of Ontario before travelling to Cuba and they would have returned to Ontario but for the injury Van Breda sustained. In my view,

the significance of the fact that they do not now reside in Ontario is diminished, as the only reason they did not return was the very injury that gives rise to the claim. In any event, the fact that the contractual arrangements were made in Ontario reflects a significant connection between the plaintiffs' claim and Ontario.

[138] Accordingly, I would not interfere with the motion judge's finding that there was a significant connection between the plaintiff's claim and Ontario.

(ii) The connection between the forum and defendant

[139] While the extent of CRL's activities in Ontario was not explored in the same depth in this case as in Charron, there was considerable evidence in the record to the same effect.

[140] As administrator and manager of the resort, CRL was responsible for international advertising campaigns and international public relations campaigns to promote the resort. To carry out these responsibilities, CRL engaged professionals in Ontario to prepare promotional materials and entered contracts with Ontario tour operators to advertise and promote the resort. The record in the Van Breda appeal includes evidence of CRL's use of Nancy Hay and the Ontario SuperClubs office to promote its activities. In a letter written by Abe Moore to Rene Denis regarding making promotional materials available, Moore wrote: "By copy of this fax I am making Mrs. Nancy Hay, Director of Sales, SuperClubs Canada, aware that you may contact her for assistance with promotions."

[141] CRL's arrangement with Denis as an agent to solicit professional athletes to provide lessons in exchange for transportation to and from the airport and an all-inclusive vacation at the resort must be also be considered.

[142] In my view, even without the benefit of the presumption arising under Rule 17.02, the record establishes a significant connection between CRL and Ontario.

(iii) Fairness

[143] I reach the same conclusion here as I reached in the Charron appeal. While the motion judge erred by considering issues of fairness more appropriately dealt with under *forum non conveniens*, when the connections between the plaintiffs' claim, the defendant and Ontario are considered and weighed from the perspective of fairness, assuming jurisdiction against CRL is fully supported. This is not a case of a local operator that confined its activities to its home jurisdiction. CRL engaged in promotional activities in Ontario and the contract it entered with Berg was made in Ontario through an agent in Ontario that CRL used to solicit professional athletes as resort instructors. Viewed through the lens of fairness, these connections are sufficient to justify the finding of a real and substantial connection.

(iv) General principles

[144] I would adopt and apply here the discussion under this heading in *Charron*.

(3) Forum non conveniens

[145] As in Charron, the motion judge conflated the test for jurisdiction *simpliciter* and *forum non conveniens* and considered matters under the former that more properly

belonged to the latter. However, when it came to deciding the issue of *forum non conveniens*, he cited and applied the correct legal test.

[146] All of the parties except CRL are located in Canada and while CRL carries on business in Cuba, it is located in the Cayman Islands. While obtaining the evidence of Cuban nationals in Ontario would be challenging, there was expert evidence explaining how their evidence could be obtained for use in an Ontario court. As Cuban law excluded damages for pain and suffering and for loss of care, guidance and companionship, the plaintiffs could suffer a loss of juridical advantage. In my view, the fact that CRL is insured may be taken into account at the *forum non conveniens* stage as a factor mitigating any difficulty CRL may have in litigating this case in Ontario.

[147] The motion judge noted that there was conflicting evidence on the fairness of the Cuban legal system. A former Canadian ambassador testified that the Cuban courts lacked judicial independence while an expert on Cuban law testified that the Cuban system of civil justice was fair and consistent with the civil law process in other civil countries. The former ambassador conceded that his concerns regarding lack of judicial independence arose from the administration of criminal justice in Cuba. The motion judge concluded that there was "an uncertainty which exists in respect of the fairness of the legal system in Cuba". In my view, comity requires more that "an uncertainty" to justify a judicial determination that condemns a foreign legal system as unfair. However, the uncertainty regarding the fairness of the Cuban legal system was discussed by the

motion judge when dealing with jurisdiction *simpliciter*, and the extent to which it affected his assessment of the *forum non conveniens* issue is not clear.

[148] In the end, I am not persuaded that the motion judge erred in finding that the evidence fell short of showing that Cuba was clearly a more appropriate forum for this action than Ontario. While this was certainly not a clear-cut case, it was a discretionary decision and I see no error of principle that would justify the interference of this court.

(4) Conclusion: Van Breda

[149] Accordingly, I would dismiss the appeal.

COSTS

[150] If the parties are unable to agree as to the appropriate disposition of costs, we will receive brief written submissions, from the respondents within 15 days of the release of these reasons and from the appellants within 10 days thereafter.

RELEASED: "RJS" Feb 2, 2010

"Robert J. Sharpe J.A."
"I agree D. O'Connor A.C.J.O."
"I agree K.M. Weiler J.A."
"I agree J.C. MacPherson J.A."
"I agree Paul Rouleau J.A."

APPENDIX A
Uniform Law Conference of Canada Model Court Jurisdiction and Proceedings Transfer Act

PART 1: Interpretation

Definitions

1. In this Act:

"person" includes a state;
"plaintiff" means a person who commences a proceeding, and includes a plaintiff by way of counterclaim or third party claim;
"proceeding" means an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion;
"procedure" means a procedural step in a proceeding;
"state" means:

(a) Canada or a province or territory of Canada; and
(b) a foreign country or a subdivision of a foreign country;

"subject matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;
"territorial competence" means the aspects of a court's jurisdiction that depend on a connection between:

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

PART 2: Territorial Competence of Courts of [Enacting Province or Territory]

Application of this Part

2(1) In this Part:

"court" means a court of [enacting province or territory].

(2) The territorial competence of a court is to be determined solely by reference to this Part.

Proceedings in personam

3. A court has territorial competence in a proceeding that is brought against a person only if:

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim;
(b) during the course of the proceeding that person submits to the court's jurisdiction;
(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
(d) that person is ordinarily resident in [enacting province or territory] at the time of the commencement of the proceeding; or
(e) there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based.

Proceedings with no nominate defendant

4. A court has territorial competence in a proceeding that is not brought against a person or a vessel if there is a real and substantial connection between [enacting province or territory] and the facts upon which the proceeding is based.

Proceedings in rem

5. A court has territorial competence in a proceeding that is brought against a vessel if the vessel is served or arrested in [enacting province or territory].

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.

Ordinary residence – corporations

7. A corporation is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if:

(a) the corporation has or is required by law to have a registered office in [enacting province of territory];
(b) pursuant to law, it:
(i) has registered an address in [enacting province or territory] at which process may be served generally; or
(ii) has nominated an agent in [enacting province or territory] upon whom process may be served generally;
(c) it has a place of business in [enacting province or territory]; or
(d) its central management is exercised in [enacting province or territory].

Ordinary residence – partnerships

8. A partnership is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if:

(a) the partnership has, or is required by law to have, a registered office or business address in [enacting province or territory];
(b) it has a place of business in [enacting province or territory]; or
(c) its central management is exercised in [enacting province or territory].

Ordinary residence – unincorporated associations

9**.** An unincorporated association is ordinarily resident in [enacting province or territory] for the purposes of this Part, only if:

(a) an officer of the association is ordinarily resident in [enacting province or territory]: or
(b) the association has a location in [enacting province or territory] for the purpose of conducting its activities.

Real and substantial connection

10**.** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if the proceeding:

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in [enacting province or territory];
(b) concerns the administration of the estate of a deceased person in relation

to:

(i) immovable property of the deceased person in [enacting province or territory]; or

(ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in [enacting province or territory];

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to:

(i) immovable or movable property in [enacting province or territory]; or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [enacting province or territory];

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include immovable or movable property in [enacting province or territory] and the relief claimed is only as to that property;

(ii) that trustee is ordinarily resident in [enacting province or territory];

(iii) the administration of the trust is principally carried on in [enacting province or territory];

(iv) by the express terms of a trust document, the trust is governed y the law of [enacting province or territory];

(e) concerns contractual obligations, and:

(i) the contractual obligations, to a substantial extent, were to be performed in [enacting province or territory];

(ii) by its express terms, the contract is governed by the law of [enacting province or territory]; or

(iii) the contract:

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession; and

(B) resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller;

(f) concerns restitutionary obligations that, to a substantial extent, arose in [enacting province or territory];

(g) concerns a tort committed in [enacting province or territory];

(h) concerns a business carried on in [enacting province or territory];

(i) is a claim for an injunction ordering a party to do or refrain from doing anything:

(i) in [enacting province or territory]; or

(ii) in relation to immovable or movable property in [enacting province or territory];

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [enacting province of territory];

(k) is for enforcement of a judgment of a court made in or outside [enacting province or territory] or an arbitral award made in or outside [enacting province or territory]; or

(l) is for the recovery of taxes or other indebtedness and is brought by the Crown [of the enacting province or territory] or by a local authority [of the enacting province or territory].

Discretion as to the exercise of territorial competence

11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

Conflicts or inconsistencies with other Acts

12**.** If there is a conflict or inconsistency between this Part and another Act of [enacting province or territory] or of Canada that expressly:

(a) confers jurisdiction or territorial competence on a court; or

(b) denies jurisdiction or territorial competence to a court, that other Act prevails.

APPENDIX B

Comparison of CJPTA, s. 10 and Ontario Rule 17.02

Court Jurisdiction and Proceedings Transfer Act s. 10	Rule 17.02
(a) enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in Ontario;	(a) in respect of real or personal property in Ontario;
(b) concerns the administration of the estate of a dead person in relation to: i. immovable property of the deceased person in Ontario; or ii. movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in Ontario;	(b) in respect of the administration of the estate of a deceased person, i. in respect of real property in Ontario, or ii. in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;
(c) brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to: i. immovable or movable property in Ontario; or ii. movable property anywhere of a deceased person who at the time of death was ordinarily resident on Ontario;	(c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of, i. real or personal property in Ontario, or ii. the personal property of a deceased person who, at the time of death, was resident in Ontario;
(d) brought against a trustee in relation to the carrying out of a trust in any of the following circumstances: i. the trust assets include immovable or movable property in Ontario and the relief claimed is only as to that property; ii. that trustee is ordinarily resident in Ontario; iii. the administration of the trust is principally carried on in Ontario;	(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

iv. by the express terms of a trust document, the trust is governed by the law of Ontario;	
	(e) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;
(e) concerns contractual obligations, and: i. the contractual obligations, to a substantial extent, were to be performed in Ontario; ii. by its express terms, the contract is governed by the law of Ontario; or iii. the contract: A. is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession; and B. resulted from a solicitation of business in Ontario by or on behalf of the seller;	(f) in respect of a contract where, i. the contract was made in Ontario, ii. the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario, iii. the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or iv. a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;
(f) concerns restitutionary obligations that, to a substantial extent, arose in Ontario;	
(g) concerns a tort committed in Ontario;	(g) in respect of a tort committed in Ontario;
	(h) in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed;
(h) concerns a business carried on in	[see 17.02(m)]

Ontario;	
(i) is a claim for an injunction ordering a party to do or refrain from doing anything: i. In Ontario; or ii. In relation to immovable or movable property in Ontario;	(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario affecting real or personal property in Ontario;
(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in Ontario;	
(k) is for enforcement of a judgment of a court made in or outside Ontario or an arbitral award made in or outside Ontario; or	(m) on a judgment of a court outside Ontario;
	(n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;
	(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;
[see s. 3(d) and s. 7]	(p) against a person ordinarily resident or carrying on business in Ontario;
[see s. 3(a)]	(q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or
(l) is for the recovery of taxes or other indebtedness and is brought by the Crown of Ontario or by a local authority of Ontario.	(r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or municipality.