



**FROM *MORGUARD* TO
CLUB RESORTS:
THE EVOLUTION OF THE
REAL AND
SUBSTANTIAL
CONNECTION TEST**

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Introduction¹

Since the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*,² the test for when a court can assume jurisdiction over an out-of-province defendant has been whether there is a "real and substantial connection" between the forum and the subject matter of the litigation. Yet post-*Morguard*, the courts have consistently struggled with how to determine when a real and substantial connection exists.

The Supreme Court of Canada's decision in *Club Resorts Ltd. v. Van Breda*³ is but the latest attempt at articulating a common law test for the real and substantial connection requirement. The simplicity of the new *Club Resorts* framework, however, is a welcome change from past formulations, which were cumbersome in practice and did not provide sufficient clarity on when a court can assume jurisdiction over a claim.

This paper tracks the evolution of the real and substantial connection test for assumed jurisdiction from *Morguard* to *Muscutt* and, most recently, to *Club Resorts*. It also compares the new *Club Resorts* test with the statutory framework laid out in the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA"), a model law adopted in several Canadian provinces and territories to govern matters of extraprovincial jurisdiction. Finally, it examines the relationship between jurisdiction *simpliciter* and the doctrine of *forum non conveniens*.

The purpose of this paper is to provide a basis for discussion on whether *Club Resorts* has provided an improved real and substantial connection test. The constitutional dimensions of the real and substantial connection requirement for assumed jurisdiction are beyond the scope of this paper. We also make only limited reference to *Club Resorts*' two companion cases, *Éditions Écosociété Inc. v. Banro Corp.*⁴ and *Breeden v. Black*⁵, since the discussion in those cases mainly pertain to *forum non conveniens* in the context of multi-jurisdictional defamation claims.⁶

¹ This paper was prepared for the Osgoode Professional Development Centre's program, *Foreign Parties in Ontario Proceedings: Challenges and Solutions for Civil Litigators*, held on May 29, 2012 in Toronto, Ontario.

² [1990] 3 S.C.R. 1077 [*Morguard*].

³ 2012 SCC 17 [*Club Resorts*].

⁴ 2012 SCC 18 [*Éditions Écosociété*].

⁵ 2012 SCC 19 [*Breeden*].

⁶ The most notable jurisprudential discussion in *Éditions Écosociété* and *Breeden* was on the issue of choice of law for defamation claims as it pertained to the *forum non conveniens* analysis. LeBel J. identified the problem of "libel tourism", i.e. "forum shopping" for defamation claims. He discussed in *obiter* whether, for defamation claims, the *lex loci delicti* rule (which holds that the applicable law is that of the place where the tort occurred) should be abandoned in favour of an approach based on the location of the most substantial harm to reputation. LeBel J. did not, however, decide the issue because in both *Éditions Écosociété* and *Breeden*, Ontario was the place where the defamation took place and where the plaintiff's reputation was most harmed. The applicable law in both cases was therefore that of Ontario.

Morguard and the “Real and Substantial Connection” Requirement for Assumed Jurisdiction

Under conflict of law principles in Canada, there are three grounds upon which a court in one province has jurisdiction over a defendant in another province or country (a.k.a. jurisdiction *simpliciter*). The first two grounds, presence-based jurisdiction and consent-based jurisdiction, are considered “traditional”.⁷ Under the former, the court has authority as of right over the defendant because the defendant was physically present in the jurisdiction at the time he or she was served with the originating process. Under the latter, the basis for the court’s jurisdiction is that the defendant attorned to it by prior agreement or by responding to the plaintiff’s claim. Both traditional bases of jurisdiction provide grounds for the recognition and enforcement of extra-provincial judgments.⁸

The third ground upon which a court has jurisdiction over an out-of-province defendant is “assumed” jurisdiction.⁹ Under this ground, the court can take jurisdiction because there is a “real and substantial connection” between the forum and the subject matter of the proceeding.

Assumed jurisdiction is a relatively recent development in the Canadian common law. It was introduced by statute in England in the mid-19th century and later included by way of *ex juris* service rules in the various provincial rules of court. However, in Ontario, until 1975 a plaintiff who sought to commence proceedings against an out-of-province defendant had to seek leave of the court by *ex parte* motion. Leave was rarely granted due to the court’s concern over interference with the territorial sovereignty of the foreign state. It was not until the Supreme Court of Canada’s decision in *Moran v. Pyle*¹⁰ that Canadian courts began recognizing jurisdiction over an *ex juris* defendant for damages sustained in the local forum. In *Moran*, Dickson J. (as he then was) recognized the need to reform Canada’s law of jurisdiction to bring it in line with the modern realities of integrated interprovincial and international commerce, travel and trade. He observed in passing that English courts were moving towards a form of “real and substantial connection” requirement.

Fifteen years later, in *Morguard*, the Supreme Court of Canada formally recognized the “real and substantial connection” requirement as the basis for assumed jurisdiction. The facts of *Morguard* concerned the enforceability of a foreign judgment; the applicant commenced proceedings in British Columbia to enforce a judgment rendered in Alberta against a B.C. resident. La Forest J. observed, however, that the principles guiding a court’s enforcement of an out-of-province judgment should be the same as the principles underlying assumed jurisdiction. He wrote: “The conditions governing the taking of jurisdiction by the courts of one province and

⁷ *Club Resorts*, *supra* note 2 at para. 79; S.G.A. Pitel and N.S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 52-113.

⁸ *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.)

⁹ The term “assumed jurisdiction” is often used interchangeably with “jurisdiction *simpliciter*”, for example, the “real and substantial connection” test is often referred to as the test for jurisdiction *simpliciter*. Strictly speaking, however, jurisdiction *simpliciter* denotes the existence of jurisdiction and is broader than assumed jurisdiction to encompass presence-based jurisdiction and consent-based jurisdiction as well.

¹⁰ [1975] 1 S.C.R. 393 [*Moran*].

those under which [their judgments] are enforced by the courts of another province should be viewed as correlative.”¹¹

Morguard recognized that while modern realities needed an expansion of jurisdictional principles, there had to be some limit to the reach of a court’s authority over out-of-province defendants. This limit would best be achieved by the requirement that a court could only entertain claims that had a “real and substantial connection” to the forum. The requirement of a real and substantial connection best reflected principles of order and fairness: it was a reasonable balance between the rights of the parties by ensuring that defendants could not escape the court’s authority merely by being outside the forum, while also ensuring that plaintiffs could not begin actions in a forum with little or no connection with the parties or the claim.

However, while *Morguard* recognized the “real and substantial connection” requirement for assumed jurisdiction, it did not define it. Furthermore, as Sharpe J.A. observed in *Muscutt v. Courcelles*,¹² *Morguard* was ambiguous as to what the nature of the connection had to be: certain passages in *Morguard* suggested that the connection that was real and substantial had to be one that linked the forum with the defendant, while other passages suggested that the connection must be between the forum and the claim, or specifically the damages suffered by the plaintiff.

The Supreme Court of Canada was given several opportunities in later cases to articulate a test for a real and substantial connection but declined to do so, holding that the doctrine must remain flexible. In *Hunt v. T&N plc*,¹³ for example, the Court wrote, “[t]he exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.”¹⁴ In *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*,¹⁵ the Court again described a “real and substantial connection” as “a term not yet defined”.¹⁶

The *Muscutt* Test (2002): Eight Contextual Factors

The Court of Appeal for Ontario’s decision in *Muscutt* provided, for the first time, a multi-factored common law test for determining a real and substantial connection. The facts in *Muscutt* involved a plaintiff from Ontario who suffered personal injuries in a car crash in Alberta involving Alberta defendants. *Muscutt* was also heard alongside four other cases that involved Ontario residents who suffered injuries outside Canada where the plaintiffs filed suits in Ontario. The central issue in all the cases was whether the courts in Ontario had jurisdiction over the matters.

¹¹ *Morguard*, *supra* note 1 at 1094.

¹² *Muscutt*, *supra* note 7 at para. 56.

¹³ [1993] 4 S.C.R. 289 [*Hunt*].

¹⁴ *Ibid.* at 325.

¹⁵ [1994] 3 S.C.R. 1022 [*Tolofson*].

¹⁶ *Ibid.* at 1049.

Writing for the Court of Appeal, Sharpe J.A. acknowledged in *Muscutt* that the real and substantial connection test, as introduced by *Morguard*, could not be reduced to a fixed formula. However, clarity and certainty were also important, and Sharpe J.A. found that it would be useful to provide motion judges and litigants with some structured guidance as to when the court could assume jurisdiction over an out-of-province defendant.

Sharpe J.A. rejected the notion that a real and substantial connection could only exist if the defendant had some connection to the forum. Instead, he took a broader approach and embraced the notion that both a connection between the forum and the defendant and a connection between the forum and the claim could form the basis of assumed jurisdiction. He set out eight contextual factors (later known as the “*Muscutt* factors” or the “*Muscutt* test”) that a motion judge must consider in deciding whether the “real and substantial connection” requirement was met:

1. The connection between the forum and the plaintiff’s claim;
2. The connection between the forum and the defendant;
3. Unfairness to the defendant in assuming jurisdiction;
4. Unfairness to the plaintiff in not assuming jurisdiction;
5. The involvement of other parties to the suit;
6. The court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7. Whether the case is interprovincial or international in nature; and
8. Comity and standards of jurisdiction, recognition and enforcement prevailing elsewhere.¹⁷

Muscutt was highly influential in distilling and articulating the considerations that should inform the “real and substantial connection” test for assumed jurisdiction. It was generally a well-regarded decision, especially at the time it was released. It brought much-needed consistency in how jurisdiction *simpliciter* should be decided and was not only applied consistently in Ontario, but also considered by appellate courts in other provinces. In his concurring judgment in *Castillo v. Castillo*,¹⁸ Bastarache J. endorsed *Muscutt* and its flexible contextual approach to assumed jurisdiction.

However, as a comprehensive body of jurisprudence developed around the *Muscutt* test, several criticisms emerged, particularly among conflict of laws scholars. First, some critics believed the eight-factor test to be too complex, too unpredictable, and conferring too much discretion on motion judges to decide the court’s jurisdiction. Second, the *Muscutt* test gave no guidance on the relationship between the eight factors or their relative weight in the analysis. The fairness factors were especially problematic because they could be used to justify assuming jurisdiction even where the connections themselves were weak. Third, many of the *Muscutt* factors, including the fairness factors, overlapped with the factors for *forum non conveniens*,

¹⁷ *Muscutt*, *supra* note 7 at paras. 77-110.

¹⁸ 2005 SCC 83.

when the court had always strived to keep the doctrines of jurisdiction *simpliciter* and *forum non conveniens* separate and distinct.¹⁹

Eight years after *Muscutt* the Court of Appeal decided to revisit the *Muscutt* test in *Van Breda v. Village Resorts Limited and Charron v. Club Resorts Ltd.*²⁰

The *Van Breda* Test (2010): An Attempt to “Clarify and Reformulate” the *Muscutt* Factors

Background to *Van Breda* and *Charron*

Although *Van Breda* and *Charron* were separate actions involving unrelated events, both cases involved plaintiffs from Ontario who suffered catastrophic personal injury or death while at a holiday resort in Cuba, and both cases named *Club Resorts Ltd.* as a defendant. *Club Resorts Ltd.* is a company incorporated in the Cayman Islands that manages several resorts in Cuba.

In *Van Breda*, the plaintiff and her partner, both Ontario residents, travelled to one of these Cuban resorts under an arrangement where the plaintiff’s partner would give tennis instructions in exchange for an all-inclusive stay for the two of them. While at the resort, the plaintiff tried to do some chin-ups on a metal apparatus on the beach but the apparatus collapsed and rendered her a paraplegic. The plaintiff eventually moved to British Columbia and never returned to Ontario. However, she and her family commenced an action in Ontario against numerous defendants including *Club Resorts Ltd.*

In *Charron*, a married couple from Ontario travelled to a different Cuban resort run by *Club Resorts Ltd.* They had purchased a one-week vacation package that, according to promotional brochures, included scuba diving. The husband died in a scuba diving incident at the resort. The *Charron* family commenced an action in Ontario against *Club Resorts Ltd.* and other defendants.

Club Resorts Ltd. moved for a stay in both proceedings on the basis that Ontario lacked jurisdiction to hear the claims or, alternatively, that Ontario should decline jurisdiction on the basis of *forum non conveniens*. Both stay motions were dismissed. *Club Resorts Ltd.* then appealed both dismissals to the Court of Appeal for Ontario, which heard the appeals together before a three-judge panel. The appeals were argued on the basis of the *Muscutt* test.

A month after the hearing, in an unprecedented move, the Court of Appeal asked counsel in both cases to return and re-argue the appeals before a five-judge panel, this time with submissions on whether and how the *Muscutt* test should be changed. The Ontario Trial Lawyers Association and the Tourism Industry Association of Ontario intervened at the second hearing.

¹⁹ See *La Succession de Feu André Gauthier v. Coutu et al.*, 2006 NBCA 16 at paras. 67-68.

²⁰ Both reported at 2010 ONCA 84 [*Van Breda* and *Charron*, respectively]. The Court of Appeal for Ontario’s decision in *Van Breda* and *Charron* were subsequently appealed to the Supreme Court of Canada, and the Supreme Court’s decision in those appeals elucidates the new test for assumed jurisdiction. For clarity, the Supreme Court of Canada’s new test is referred to as the *Club Resorts* test, to distinguish it from the *Van Breda* test laid out by the Court of Appeal for Ontario.

The resulting decision of the Court of Appeal was a “clarification and reformulation” of the *Muscutt* test that sought to address some of the criticisms levelled at *Muscutt*. It also attempted to bring the common law approach to determining a real and substantial connection closer in line with the statutory framework of the CJPTA (see below).

The Court of Appeal’s reformulated test (referred to here as the “*Van Breda* test”) has proved short-lived, having been appealed to the Supreme Court of Canada and replaced with the *Club Resorts* test within two years. However, the *Van Breda* test is still worth careful examination because of its attempt to combine the flexible, multi-faceted and contextual approach favoured in *Muscutt* with the presumptive categorical approach taken in the CJPTA and the *Club Resorts* decision.

Van Breda Reformulates the *Muscutt* Factors into a Two-Part Test

In the *Van Breda* decision, Sharpe J.A. took the eight factors that he had developed in *Muscutt* and re-organized them into a two-stage analysis.

The first stage was to determine whether there was or was not a presumption of a real and substantial connection between the local forum and the defendant or the claim. This stage of the *Van Breda* test largely incorporated the categorical approach of the CJPTA. Sharpe J.A. noted that the post-*Muscutt* jurisprudence revealed that certain types of connections were consistently found to be real and substantial, and these connections tended to mirror the circumstances where out-of-province defendants could be served without leave pursuant to the provincial rules of court. In Ontario, service *ex juris* without leave is governed by rule 17.02 of the *Rules of Civil Procedure*²¹ Sharpe J.A. therefore proposed that the connections listed under that rule could be presumed to be real and substantial.

He noted two exceptions, however: the fact that the plaintiff’s damages may have been sustained in the local jurisdiction (subrule 17.02(h)) or that the out-of-province defendant was a necessary or proper party (subrules 17.02 (o)) should not give rise to a presumption of a real and substantial connection. The case law showed that neither type of connection was a sufficiently reliable indicator of a real and substantial connection to the forum.

Therefore, under the *Van Breda* test, if one of the connections described in rule 17.02 of the *Rules of Civil Procedure* (excepting subrules (h) and (o)) applied, then a real and substantial connection was presumed to exist; the burden then fell on the defendant in the second stage of the analysis to displace the presumption. If none of the presumed connections under rule 17.02 applied, then no jurisdiction was presumed, and the burden fell on the plaintiff to show that a real and substantial connection actually existed.

At the second stage of the proposed *Van Breda* test, the court examined the connections between the forum and the plaintiff’s claim and between the forum and the defendant. While

²¹ The idea of presumptive categories of real and substantial connections based on the court rules for service *ex juris* was a notion alluded to in *Muscutt*, in which the court observed that the court rules for service on an out-of-province defendant without leave provided “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”: see *Muscutt*, *supra* note 7 at para. 51.

these had been but two of eight factors under *Muscutt*, Sharpe J.A. held that an examination of these two connections should form the “core” of the real and substantial connection analysis. The remaining six *Muscutt* considerations were not to be treated as independent factors but as general principles to help assess the significance of these two connections.²² In particular, considerations of the fairness of assuming or refusing jurisdiction should only be used as “analytical tools” to assess the “relevance, quality and strength” of the two connections. Fairness alone cannot trump weak connections.

The difficulty with the Court of Appeal’s *Van Breda* test, and perhaps the reason why the Supreme Court of Canada opted not to adopt it in its decision in *Club Resorts*, was that in attempting to clarify the real and substantial connection test, the Court of Appeal arguably obfuscated the test further. First, not only did *Van Breda* introduce a shifting burden of proof into the real and substantial connection analysis where none existed before, but the question of who bore the initial burden, and what the content of that burden was, constituted an issue that required argument and determination. Second, the court emphasized that the first two *Muscutt* factors – the connection between the forum and the plaintiff’s claim, and the connection between the forum and the defendant – should form the core of the analysis, while all the other *Muscutt* factors were merely “analytical tools” to assess those connections. However, in practice this was perhaps a distinction without a difference, as the “analytical tools” would still have to be examined in detail in much the same way as if they were “factors” of a real and substantial connection.

Nonetheless, what was commendable about the *Van Breda* formulation of the real and substantial connection test was Sharpe J.A.’s attempt at creating a hybrid between the holistic approach of *Muscutt* (i.e. requiring specific contextual dimensions to be considered before assuming jurisdiction) and the presumptive categorical approach used in the CJPTA. This hybrid approach was ultimately abandoned by the Supreme Court in *Club Resorts*, which discarded the *Muscutt* factors largely in favour of a presumptive category-based approach to assumed jurisdiction similar to the CJPTA.

The New *Club Resorts* Test (2012)

Van Breda and *Charron* were appealed to the Supreme Court of Canada and were heard alongside two other cases from Ontario, *Éditions Écosociété Inc. v. Banro Corp.* and *Breeden v. Black*.²³ The Supreme Court of Canada’s decisions in these cases were reserved for over a year before they were finally issued in April 2012.

²² *Van Breda*, *supra* note 19 at para. 98.

²³ As mentioned above, both *Éditions Écosociété* and *Breeden* dealt with assumed jurisdiction in the context of the tort of defamation. In *Éditions Écosociété*, the plaintiff was a mining corporation that filed a defamation action in Ontario against certain Quebec defendants who published a book which commented on the plaintiff’s operations in the Democratic Republic of Congo. The defendants all lived and worked in Quebec and the book was mainly published in Quebec, but a limited number of copies were also distributed in Ontario.

The resulting test arising from these decisions, known as the *Club Resorts* test, is more succinct than previous judicial attempts at formulating a test for assumed jurisdiction. It provides greater guidance than *Morguard* on how to determine whether a connection is real and substantial, but also appears to be more easily applicable than either the eight-factor *Muscutt* framework or the *Van Breda* reformulation.

Writing for a unanimous Court, LeBel J. embraced the categorical approach to assumed jurisdiction by introducing the concept of “presumptive connecting factors”.²⁴ Like Sharpe J.A. in the decision below, LeBel J. observed that the “wisdom and experience drawn from the life of the law”²⁵ has shown there to be certain connections that are consistently found to be real and substantial. They should therefore be presumed as such.

Under the new *Club Resorts* test, the party asking a court to assume jurisdiction has the burden of establishing that a presumptive connecting factor links the subject matter of the litigation to the forum. If a presumptive connection factor is established, then jurisdiction is presumed. However, a defendant could rebut the presumption by establishing facts showing that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum, or points only to a weak relationship between them. If no presumptive connecting factor applies, or if the presumption of jurisdiction is rebutted, then the court must dismiss or stay the action subject to the possible application of the doctrine of forum of necessity.

LeBel J. identified four presumptive connecting factors for tort claims:

- (a) the defendant is domiciled or resident in the province;
- (b) the defendant carries on business in the province;²⁶
- (c) the tort was committed in the province; or
- (d) a contract connected with the dispute was made in the province.

He also declined to identify what the presumptive connecting factors were for other types of claims, given that all four cases before the court involved actions in tort.²⁷

In *Breeden*, the plaintiff Conrad Black filed six libel actions in Ontario against various directors, officers and advisors of Hollinger International Inc. He alleged that the defendants made certain defamatory statements about him in the company’s press releases and reports that were subsequently reproduced in the press, which caused damage to his reputation in Ontario. Only one of the defendants lived in Ontario; the others lived in Israel and five different U.S. jurisdictions.

²⁴ It is worth noting that while *Muscutt* and *Van Breda* spoke of the required “real and substantial connection” being between the forum and the defendant or the forum and the claim, *Club Resorts* has now generalized that language to say that the connection is between the “forum and the subject matter of the litigation”.

²⁵ *Club Resorts*, supra note 2 at para. 83.

²⁶ With respect to this presumptive connecting factor, LeBel J. cautioned that “[t]he notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction”: *Club Resorts*, ibid. at para. 87. Active advertising or making a website accessible in a jurisdiction is not enough to establish that the defendant is carrying on business there, although LeBel J. left the door open with respect to e-trading in the jurisdiction.

LeBel J. emphasized that the list of presumptive connecting factors is not closed, and the court could identify new ones over time. He held that in recognizing a new presumptive connecting factor, the court should have regard to four considerations:

- (a) similarity of the connecting factor with the presumptive connecting factors already recognized;
- (b) treatment of the connecting factor in the case law;
- (c) treatment of the connecting factor in statute law; and
- (d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

However, any new presumptive connecting factors should be factual in nature. General principles such as fairness, efficiency or comity are not in themselves presumptive connecting factors,²⁸ but are instead values underlying all presumptive connecting factors, both listed and new.²⁹

As mentioned above, the most notable feature of the *Club Resorts* decision is the abandonment of the contextual considerations that were the basis of the *Muscutt* analysis, in favour of a presumptive categorical approach. As well, the role of fairness is now much more limited in the assumed jurisdiction analysis than even *Van Breda* had proposed. Fairness is no longer relevant in determining whether a real and substantial connection exists in any given case; instead, it now functions only as a value that informs the court's decision to recognize a new presumptive connecting factor in the common law. This is a welcome development, as one of the main criticisms of *Muscutt* was that fairness weighed too heavily in the court's decision of whether jurisdiction *simpliciter* existed, and often overlapped or was confused with the *forum non conveniens* analysis.

Another significant feature of *Club Resorts* is its affirmation that where a real and substantial connection is made out, the court must assume jurisdiction over all aspects of the action, even if the real and substantial connection relates only to one of the asserted claims. LeBel J. stated that to require the plaintiff to litigate related claims in different jurisdictions – for example, to assert a tort claim in Manitoba and a related claim for restitution in Nova Scotia – would be contrary to the objectives of fairness and efficiency.³⁰

Applying the new test to the facts of the appeals before the Court, jurisdiction *simpliciter* was made out in all four cases based on the presence of one of the four presumptive connecting factors that LeBel J. had identified. In *Van Breda*, a contract was entered into in Ontario. In *Charron*, the court found that the defendant *Club Resorts* Ltd. carried on business in Ontario. In both *Éditions Écosociété* and *Breeden*, because the allegedly defamatory material was distributed or published in Ontario, the court determined that the tort of defamation was

²⁷ *Ibid.* at para. 85.

²⁸ *Ibid.* at para. 84.

²⁹ *Ibid.* at para. 92.

³⁰ *Ibid.* at para 99.

committed in Ontario. In all four cases, the defendants failed to rebut the presumption of jurisdiction.

Comparing *Club Resorts* to the CJPTA

The CJPTA was developed as a model law by the Uniform Law Conference of Canada in 1994 with the objective of creating a unified approach to assumed jurisdiction across the country. Section 3 of the CJPTA codifies the common law grounds of jurisdiction *simpliciter*, including assumed jurisdiction. Section 3(e), for example, provides that the court may assume jurisdiction if “there is a real and substantial connection between [the forum] and the facts on which the proceeding against that person is based.” Section 10 then provides a long non-exhaustive list of connections that are presumed to be real and substantial.

Club Resorts takes a similar approach to assumed jurisdiction as the CJPTA. However, the list of presumed real and substantial connections in section 10 of the CJPTA is much longer than the four presumptive connecting factors provided in *Club Resorts*. Indeed, all four presumptive connecting factors in *Club Resorts* are found in some form in the CJPTA. Unlike the four presumptive connecting factors identified in *Club Resorts*, the presumptive categories in the CJPTA relate not only to tort claims but a myriad of other causes of action. For example, a real and substantial connection is presumed to exist if the proceeding “concerns restitutionary obligations that, to a substantial extent, arose in [the local forum]” (section 10(f)).

Since the new *Club Resorts* test is only a common law test for assumed jurisdiction, it does not apply in jurisdictions that have adopted the CJPTA, which so far consist of British Columbia, Nova Scotia, Saskatchewan, and the Yukon. Several other provinces, including Ontario, Alberta, and Manitoba have also been considering whether to enact the CJPTA, although it is unclear whether these provinces still plan to do so, given that the new *Club Resorts* test mirrors much of the approach taken by the CJPTA. (Quebec’s Civil Code also has its own scheme for dealing with issues of jurisdiction over extra-provincial defendants.)

Jurisdiction *Simpliciter* Versus *Forum non Conveniens*

As mentioned above, one of the criticisms of the *Muscutt* test was that some of its factors, particularly the fairness factors, overlapped with the test for *forum non conveniens*. In *Club Resorts* and its companion cases, Lebel J. took pains to re-emphasize the distinction between the existence of jurisdiction (i.e. jurisdiction *simpliciter*) and the exercise of jurisdiction.

The doctrine of *forum non conveniens* relates to the court’s discretion, after it has found that it has jurisdiction over a matter, to decline to exercise this jurisdiction on the basis that there is an alternative forum that is in a better position to fairly and efficiently dispose of the litigation.

Because *forum non conveniens* “has no relevance to the jurisdictional analysis itself”³¹, the real and substantial connection test must not anticipate, incorporate or replicate the consideration of factors relevant to *forum non conveniens*. Hence, for example, the desire to avoid a

³¹ *Ibid.* at para. 101.

multiplicity of proceedings should not come into play when deciding whether there is a real and substantial connection. The court should consider the factors that inform the *forum non conveniens* analysis only after jurisdiction *simpliciter* is made out. Furthermore, the court cannot consider applying *forum non conveniens* on its own initiative; it must be invoked by one of the parties.

As LeBel J. observed in *Club Resorts*, the threshold for *forum non conveniens* is high, and “the normal state of affairs is that jurisdiction should be exercised once it is properly assumed.”³² The court will not stay or dismiss a proceeding on the basis of *forum non conveniens* just because another comparable forum exists. Instead, the alternative forum must be *clearly* more appropriate for the adjudication of the claim.

In deciding whether to decline jurisdiction on the basis of *forum non conveniens*, the court will compare the local and alternative fora with reference to an array of contextual factors. The CJPTA provides the following factors that the court should consider in exercising *forum non conveniens*, which LeBel J. affirmed as “a helpful reference”:³³

- (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.

However, LeBel J. confirmed that no list of factors under *forum non conveniens* could be exhaustive, and the factors may vary depending on the context of each case. Indeed, the Court of Appeal in *Muscutt*, the Quebec Court of Appeal in *Oppenheim forfeit GMBH c. Lexus maritime inc.*,³⁴ and the CJPTA all provide slightly different variations on what factors should be considered.

Unlike a determination of the existence of jurisdiction *simpliciter*, which is reviewed on appeal on the basis of the standard of correctness, a motion judge’s decision to exercise or decline jurisdiction on the basis of *forum non conveniens* is accorded deference and will not be overturned absent an error in principle or a serious misapprehension of the facts.

All of the above is essentially a restatement of the law of *forum non conveniens* as it had stood before *Club Resorts* and its companion cases. However, one significant change to the *forum non conveniens* doctrine that the LeBel J. suggests in *Club Resorts* and particularly in *Breeden*³⁵ is the

³² *Ibid.* at para. 109.

³³ *Breeden*, *supra* note 4 at para. 28.

³⁴ 1998 CanLII 13001.

³⁵ See *Breeden*, *supra* note 4 at paras. 26-27.

diminished role that loss of juridical advantage should play as a factor in the *forum non conveniens* analysis.

A plaintiff may choose to commence a proceeding in a jurisdiction where the substantive or procedural law is more favourable to his or her claim. Courts have historically considered the possible loss of this juridical advantage when deciding whether to decline jurisdiction under *forum non conveniens*. For example, in *Van Breda*, the Court of Appeal noted that “[a]s 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”, and that this weighed against staying or dismissing the Ontario proceeding.

In *Club Resorts*, however, the Supreme Court cast significant doubt on whether loss of juridical advantage should factor into the *forum non conveniens* analysis, as it was inconsistent with principles of comity. LeBel J. wrote: “[A] focus on juridical advantage may put too strong an emphasis on issues that may reflect only differences in legal tradition which are deserving of respect, or courts may be drawn too instinctively to view disadvantage as a sign of inferiority and favour their home jurisdiction.”³⁶ Furthermore, any loss of juridical advantage to the plaintiff is counterbalanced by the juridical disadvantage to the defendant if the action is allowed to proceed in the local forum. LeBel J. did not go so far as to remove loss of juridical advantage as a factor entirely, stating instead that its significance in any given case remained in the discretion of the motion judge. However, he held that it should generally not be given much weight in the *forum non conveniens* analysis.

Conclusion

Club Resorts and its companion cases constitute a significant milestone in the law of assumed jurisdiction. After long declining to define the particulars of how a court should decide whether a real and substantial connection exists, the Supreme Court of Canada has now weighed in with a test that is considerably clearer than either *Muscutt* or *Van Breda*. While arguably a certain degree of flexibility has been lost due to the abandonment of *Muscutt*'s holistic approach, it is compensated by the consistency and predictability provided by the new presumptive connecting factors. The *Club Resort* test's similarity to the CJPTA's approach to assumed jurisdiction also ensures a greater uniformity between the provinces and territories that have adopted the CJPTA and those that have not.

The *Club Resorts* test also provides greater room for refinement and growth than previous incarnations of the real and substantial connection test. Given that the list of presumptive factors provided by *Club Resorts* relates only to tort claims, the application of the new test to other types of claims will be a subject of further judicial consideration. It also remains to be seen how willing courts will be in recognizing new presumptive connecting factors.

³⁶ *Breedon, ibid.* at para. 26; *Club Resorts, supra* note 2 at para. 112.