STAKING CLAIMS AGAINST FOREIGN DEFENDANTS IN CANADA: CHOICE OF LAW AND JURISDICTIONAL ISSUES ARISING FROM THE IN PERSONAM EXCEPTION TO THE MOÇAMBIQUE RULE FOR FOREIGN IMMOVABLES

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Introduction

Under conflict of laws, the *lex situs*[1] determines the existence, nature, scope and enforceability of *in rem* real property rights[2] or immovables.[3] Most famously expressed by the House of Lords in *The British South Africa Company v. Companhia de Moçambique*, the "*Moçambique* rule" states that the forum has no jurisdiction to determine the title to, or the right to the possession of, any immovable situate outside of the forum.[4] Dating back centuries,[5] the

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1. Latin for "the law of the place where property is situated": Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, MN: Thomson/West, 2004).
2. *Ibid.*, "A technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam* . . .".
3. J.G. Castel and Janet Walker, *Canadian Conflict of Laws*, 6th ed., looseleaf ed., release 10, Dec. 2007 (Markham: LexisNexis Canada Inc. 2005), vol. 1, §10.18, p. 10-52 and vol. 2, §23.1, p. 23-1; James G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983), c. 2, "The Law of Property: Particular Transactions", at p. 319; Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed. (London: Sweet & Maxwell, 2006), vol. 2; *Voyage Co. Industries Inc. v. Craster*, [1998] B.C.J. No. 1884 (QL), 81 A.C.W.S. (3d) 788 (B.C.S.C.). The term "foreign real property" is a common law concept, whereas the phrase "foreign immovables" is borrowed from the civil law and is generally used in conflict of laws. Both terms are used interchangeably throughout this article.
4. *The British South Africa Company v. Companhia de Moçambique*, [1893] A.C. 602 (H.L.). In the United States, see *Massie v. Watts*, 10 U.S. (6 Cranch.) 148 (1810); *Clarke v. Clarke*, 178 U.S. 186 (1900) and *Fall v. Eastin*, 215 U.S. 1 (1909), which hold that courts have no jurisdiction to hear disputes relating to the determination of title to, the right to possession of, or the recovery of damages for trespass to any immovable property located outside their territorial jurisdiction. An exception lies where a contract only has some incidental effect on immovable property, such as property pledged as collateral security for a loan. If the immovable property is incidental to the contract, then the contract is assessed under traditional choice of law principles for contract. If, however, the primary purpose of the contract is to transfer the property, then the local court will analyze the entire contract under the law of the state where the property is located. For criticisms of the *Moçambique* rule as anachronistic, see American Law Institute, *Restatement, Second, of Conflict of Laws*, §87, comm. a. For a historical and policy-based analysis which ultimately led to the abolition of the *Moçambique* rule in New South Wales, Australia, see Law Reform Commission of New South Wales, Report 63 (1988) — Jurisdiction of Local Courts over Foreign Land, available at: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R63TOC> (date last accessed: May 3, 2008).
5. McLeod, *supra*, footnote 3, at p. 319, cites the centuries-old decision in *Skinner v. East India Co.* (1666), 6 St. Tr. 710 (H.L.), which appears to be the earliest instance of the House of Lords making the distinction between local and transitory actions. In particular, the House of Lords held that matters complained of by the petitioner "touching the taking away of the petitioner's ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon his majesty's ordinary courts at Westminster", were transitory in nature. By contrast, facts relating to "the dispossessing [the petitioner] of his house and island . . . was not relievable in any ordinary court of law" were local in nature, having occurred outside of England.
6. McLeod, *ibid.*, at pp. 319-20.
7. *Duke v. Andler*, [1932] S.C.R. 734, [1932] 4 D.L.R. 529 and *Lauser v. Lauser* (1993), 2 E.T.R. (2d) 243 at para. 8 (B.C.S.C.). The rule is not confined to the formalities of transfer of title, but extends to all disputes touching the land, including debt, trust or tort. See also Castel and Walker, *supra*, footnote 3, vol. 1, §10.18, p. 10-52 and McLeod, *ibid.*, at pp. 321-22; Winston Anderson, "Foreign Orders and Local Land: The Caribbean Gets Its Own Version of Duke v. Andler" (1999), 48 Int'l & Comp L.Q. 167; M.R. Chesterman, "Foreign Land and English Equity" (1970), 33 Mod. L. Rev. 209; Adeline Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005), 54 Int'l. & Comp. L.Q. 855.

predominant view has been that common law actions framed in contract for damages for breach or in debt to enforce the promise of payment of an agreed sum were transitory in nature. Conversely, actions involving enforcement of property rights were local, particularly actions for trespass and ejectment, which historically were tried by juries with personal knowledge of the facts.[6] Thus, this widely recognized rule of private international law restrains local courts from adjudicating on the subject-matter of the dispute involving determination of rights or title to foreign real property.[7] Essentially, the *Moçambique* rule is a rule of law. However, as with many legal rules, there lies an exception. In (purportedly) limited circumstances, a Canadian court may exercise *in personam* jurisdiction and enforce rights against a foreign defendant that incidentally affect foreign land, commonly known as the "*in*

personam exception" based upon Professor McLeod's four prerequisites. These are:

1. The court must have *in personam* jurisdiction over the defendant(s). The plaintiff must accordingly be able to serve the defendant with originating process, or the defendant must submit to the jurisdiction of the court.[8]
2. There must be some personal obligation running between the parties. The jurisdiction cannot be exercised against strangers to the obligation unless they have become personally affected by it.
3. The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment. Accordingly, the court will not order the judicial sale of foreign land since such a sale requires supervision by the courts of the *situs*. It will, however, order a foreclosure of a mortgage or decree of specific performance regarding foreign land.
4. Finally, the court will not exercise jurisdiction if the order would be of no effect in the *situs*. Thus, jurisdiction will be declined if the *lex situs* prohibits effective enforcement of the decree. The mere fact, however that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order.[9]

However firmly rooted in the historical development of property law, the issues of jurisdiction and the nature and scope of equitable remedies have led to considerable overlap and confusion within the law of contract (*e.g.* the creation and/or transfer of rights in or over

8. See, *infra*, footnote 27. See also C. Dusten and S. Pitel, "The Right Answers to Ontario's Jurisdictional Questions: Dismiss, Stay or Set Service Aside" (2005), 30 Adv. Q. 297 and Janet Walker, "Beyond Real and Substantial Connection: The Muscutt Quintet", in the *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2003), pp. 61-92.
9. *Catania v. Giannattasio* (1999), 174 D.L.R. (4th) 170, 118 O.A.C. 330, 28 C.P.C. (4th) 207 (C.A.) *per* Laskin J.A, citing with approval the four prerequisites for the exercise of *in personam* jurisdiction from McLeod, *supra*, footnote 3, at pp. 322-26. This is also referred to as the exception to the *Moçambique* rule — that a forum has jurisdiction over a matter, even though the proceedings are concerned with foreign immovable property, if it is based on a contract or equity between the parties ("the exception"). This is embodied in Rule 122(3), exception (a) of *Dicey Morris & Collins*, who cite, *inter alia*, *Penn v. Baltimore* (1750) 1 Ves Sen 444, 27 E.R. 1132 (L.C.); *Deschamps v. Miller*, [1908] 1 Ch. 856 and *Griggs (R) Group Ltd v. Evans (No. 2)*, [2004] EWHC 1088.

property). There is a similar conceptual blur within the law of trusts (*e.g.* the control over non-title holders having a legal and/or beneficial interest in property); the law of succession (inheritance including transfers *inter vivos*); tort law (*e.g.* trespass to land and nuisance claims) and unjust enrichment or restitution (*e.g.* equitable remedies such as declaratory and injunctive relief, the imposition of constructive and resulting trusts, and tracing of proceeds).[10]

Part I introduces the key components of judicial jurisdiction[11] in the context of Canadian private international law. Part II provides an overview of the nature and scope of the *in personam* exception. Part III considers the utility of the "real and substantial connection" test pronounced by the Ontario Court of Appeal in *Muscutt v. Courcelles*,[12] by analyzing the *in personam* exception through the prism of recent Canadian case law where jurisdictional challenges raised relating to claims involving foreign real property led to divergent results. The recent jurisprudential trend of applying the *in personam* exception in lieu of subject-matter jurisdiction increases legal uncertainty by neglecting the Supreme Court of Canada's edict of "properly restrained jurisdiction" and the constitutional imperatives of order and fairness.[13]

10. In *Webb v. Webb*, [1991] 1 W.L.R. 1410 at p. 1418 (Ch. D.), Paul Baker Q.C. explained the *in personam* exception as follows: "Where there is a defendant within the court's jurisdiction, and there exists some relationship between him and the plaintiff arising out of contract, trust or fraud or other fiduciary bond, the court may make an order directed to the defendant to perform his contract, carry out his fiduciary duties or undo the effects of his fraud. Through the relationship, the defendant's conscience is affected and bound. The sanctions for failure to carry out the order are commitment for contempt and sequestration of any assets of his to be found within the jurisdiction. It is no objection that the order relates to land abroad, save only this, that the order will not be made if the carrying of it out is illegal or impossible according to the lex situs."
11. For the distinction between judicial jurisdiction and legislative jurisdiction, see Janet Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet", in The Hon. Justice Todd Archibald and Michael Cochrane, eds., *Annual Review of Civil Litigation, 2002* (Toronto: Thomson Carswell, 2003), pp. 61-92 at pp. 85-89 (hereafter "Walker, *Muscutt* Quintet").
12. (2002), 213 D.L.R. (4th) 577 at pp. 605-10, 60 O.R. (3d) 20 at p. 35, 160 O.A.C. 1 (C.A.), supp. reasons 213 D.L.R. (4th) 661, 162 O.A.C. 122, 13 C.C.L.T. (3d) 238; see also the companion cases *Gajraj v. DeBernardo* (2002), 213 D.L.R. 4th 651, 60 O.R. (3d) 68, 160 O.A.C. 60 (C.A.); *Leufkens v. Alba Tours International Inc.* (2002), 213 D.L.R. (4th) 614, 60 O.R. (3d) 84, 160 O.A.C. 43 (C.A.); *Lemmex v. Bernard* (2002), 213 D.L.R. (4th) 627, 60 O.R. (3d) 54, 160 O.A.C. 31 (C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 213 D.L.R. (4th) 643, 60 O.R. (3d) 76, 160 O.A.C. 54 (C.A.).
13. For criticisms of the "real and substantial connection" test, see Tanya J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in

Canadian courts have struggled in distinguishing between *in personam* jurisdiction and subject-matter jurisdiction and specifically the *Moçambique* rule. In particular, they appear to overlook the two-fold jurisdictional requirement that in order to proceed in a given case they must have both types of jurisdiction — *in personam* and subject-matter. Accordingly, when jurisdictional challenges arise out of a dispute dealing with foreign immovables, Canadian courts influenced by the post-*Morguard* focus on *in personam* jurisdiction are dealing with the foreign land question under the rubric of *in personam* jurisdiction, not under the traditional heading of subject-matter jurisdiction. While Professor McLeod was writing about the four prerequisites for the *in personam* exception in 1983,[14] his doctrinal approach remains relevant for determining subject-matter jurisdiction over claims involving foreign immovables. In Part IV, I propose a three-factored test for jurisdiction *simpliciter*, which integrates the *in personam* exception in respect of foreign immovables.

Part I — The Four Pillars of Jurisdiction: Sovereignty, Comity, Order and Fairness

Historically, the substantive distinction made between proceedings *in rem* and *in personam* was based upon the local court's ability to exercise only personal jurisdiction over the parties by adjudicating upon legal and equitable rights and granting remedies in respect of the subject-matter of the dispute.[15] Essentially, the *Moçambique* rule is a fundamental precept of the wider concept of jurisdiction, which is itself a corollary of state sovereignty and territoriality:[16]

> Jurisdiction broadly refers to the power, authority, and competence of a state to govern persons and property within its territory. It is labelled "prescriptive" and "enforcement." Prescriptive jurisdiction relates to the power of a state to make or prescribe law within and outside its territory, and enforcement jurisdiction is about the power of the state to implement the law within its territory. Jurisdiction exercised by states is then the corollary of their sovereignty. Jurisdiction is clearly founded on territorial sovereignty but extends beyond it. Jurisdiction is *prima facie* exclusive over a state's territory and population, and the general duty of nonintervention in domestic affairs protects both the territorial sovereignty and the domestic jurisdiction of states on an equal basis.

In *Morguard Investments Ltd. v. De Savoye*,[17] comity was defined as "the deference and respect due by other states to the actions of a state legitimately taken within its territory".[18] In *Hunt v. T & N plc*,[19] the Supreme Court of Canada added that the assessment of the "reasonableness" of a foreign court's assumption of jurisdiction was not a mechanical accounting of connections between a case and a territory, but must be "guided by the requirements of order and fairness",[20] later prioritized in *Tolofson v. Jensen*[21] such that ". . . *order comes first. Order is a precondition to justice.*"[22] Hence, the syllogism "order and fairness are underlying principles; order comes first; order is a precondition of justice" should apply generally to any common law or civil law system which not only observes private international law principles, but also explicitly adopts customary international law into the domestic legal order.[23]

A potential counter-argument is that the foregoing syllogism is based upon a false premise, in that injustice is a precondition of disorder. Ultimately, justice creates order and injustice creates disorder. The Hobbesian view that "order is a precondition to

Canada" (2007), 33 Queen's L.J. 179; Walker, *Muscutt* Quintet, *supra*, footnote 11, at pp. 61-92 and Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007), 52 McGill L.J. 555.

14. *Supra*, footnotes 3 and 9. Professor McLeod's four-factored approach, originally cited with approval in *Catania v. Giannattasio*, *supra*, footnote 9, was recently reaffirmed in *Precious Metal Capital Corp. v. Smith* (2008), 297 D.L.R. (4th) 746, 92 O.R. (3d) 701 (Ont. C.A.) *per* Doherty, Moldaver and Cronk JJ.A., discussed *infra*. See also *Blue Note Mining Inc. v. CanZinco Ltd.*, 2008 CarswellOnt 7088 (Ont. Div. Ct.) *per* J. Wilson J.
15. Castel and Walker, *supra*, footnote 3, §10.1.b, p. 10-1-10-2.
16. Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background*, supplementary volume to the *Report of the International Commission on Intervention and State Sovereignty* (Ottawa: The International Development Research Centre, 2001), p. 5 (available online at: <http://www.idrc.ca/en/ev-28492-201-1-DO_TOPIC.html>).
17. *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, [1991] 2 W.W.R. 217.
18. *Morguard*, *ibid.*, at p. 1095.
19. *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16, [1993] 4 S.C.R. 289; see also *United States of America v. Ivey* (1995), 26 O.R. (3d) 533, [1995] O.J. No. 3579 (QL) (Gen. Div.), affd 30 O.R. (3d) 370, [1996] O.J. No. 3360 (QL), 139 D.L.R. (4th) 570 (C.A.), leave to appeal to S.C.C. refused 145 D.L.R. (4th) vii.
20. *Ibid.*, at p. 42.
21. *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, [1995] 1 W.W.R. 609.
22. *Ibid.*, at p. 1058 (emphasis added).
23. Applying "adoptionist" theory, the Supreme Court of Canada recently affirmed that customary international law is part of the law of Canada. See *R. v. Hape* (2007), 280 D.L.R. (4th) 385 at para. 36, [2007] 2 S.C.R. 292, 227 O.A.C. 191 *per* LeBel J., quoting with approval *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 at p. 554 (C.A.) (*per* Denning L.J.). *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692 (U.S.S.C. 2004).

justice" is a recurring theme in Hartian (positivist or realist) conceptions of the common law.[24] On the one hand, substantive and procedural laws reflect a positivist expression of a static, predictable and consistent set of rules, principles and policies guiding and, perhaps, coercing individual, group and institutional behaviour to create a semblance of reasonable expectations within the civil justice system. On the other hand, a relativistic conception of justice suggests that substantive and procedural law is malleable —expanding and contracting incrementally or paroxysmally —as socio-economic, political and technological forces approach a "tipping point"[25] and the dividing line between private law and public law begins to blur.[26] As Justice Oliver Wendell Holmes so eloquently phrased it: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . .".[27] Nevertheless, certain legal rules or principles withstand not only the test of time, but also the vicissitudes of judicial parochialism. If private international law depends upon comity, order and fairness, then there must be, in the words of Justice Major, "reasonable grounds for assuming jurisdiction" by limiting the scope of the *in personam* exception to the *Moçambique* rule for foreign immovables. The next section addresses the typology of jurisdiction and choice of law in the context of foreign immovables with an emphasis on why Canadian courts need to retain the traditional substantive/procedural dichotomy.

24. See David Dyzenhaus, "The Genealogy of Legal Positivism" (2004), 24 Oxford J. Leg. Stud. 39. See also John Austin, *The Province of Jurisprudence Determined*, H.L.A. Hart ed. (New York: Noonday Press, 1954); H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994); Hans Kelsen, M. Knight, tr., *Pure Theory of Law*, 2nd ed. (Berkeley, CA: University of California Press, 1967).
25. See Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Difference* (New York, NY: Bay Back Books/Little Brown & Company, 2000/2002).
26. *Cf. Inquiry into Pediatric Forensic Pathology in Ontario, Ruling on the CPSO Motion for Directions* dated 2007-10-10 *per* Commissioner Goudge at p. 12 and the discussion of the meaning of "civil proceeding" in s. 36(3) of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18. It is arguable that while a "public inquiry does not decide upon private rights" and is investigative in nature, it also serves to anchor the factual and evidentiary record, which is *prima facie* the purpose of an adjudicative process.
27. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 at p. 222 (USSC 1917) *per* Justice Oliver Wendell Holmes, Jr. (in dissent).

Part II — The Nature and Scope of the In Personam Exception

(1) The Duality of the Moçambique Rule: Both Personal Jurisdiction and Subject-Matter Jurisdiction

It must be emphasized that the *Moçambique* rule is a *mandatory* jurisdictional rule for both domestic and foreign immovables, both in terms of personal and subject-matter jurisdiction. For example, under various provincial rules of procedure, service *ex juris* without leave is presumptively allowed for claims involving both real and personal property within the province.[28] Under rules 17.02(a) to (e) of the Rules of Civil Procedure, service on an out-of-province defendant without leave is permitted in the following situations involving real property in Ontario:

> *Service Outside Ontario Without Leave*
> 17.2 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> Property in Ontario
> (a) in respect of real or personal property in Ontario;[29]
>
> Administration of Estates
> (b) in respect of the administration of the estate of a deceased person,
> (i) *in respect of real property in Ontario*, or
>
> . . . . .
>
> Interpretation of an Instrument
> (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
>
> . . . . .
>
> Trustee Where Assets Include Property in Ontario

28. R.R.O. 1990, Reg. 194, as am. (hereafter Ontario Rules). Although subrule 17.02(n) of the Ontario Rules provides for service *ex juris* against a person outside Ontario if authorized by statute, the author is unaware of any such legislation involving foreign property, real or personal.
29. *Cf. McMahon v. Waskochil*, [1945] O.W.N. 887 (Master), where the court held that a declaratory action that foreign defendants held land in Ontario as trustees fell within rule 17.02(a). Based upon the *Muscutt* ruling that procedural rules do not confer jurisdiction (*Muscutt*, *supra*, footnote 12), this case no longer appears to be correct.

(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*;

Mortgage on Property in Ontario

(e) *for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario*;

It is self-evident that the *Moçambique* rule governs where real property is localized within the court's jurisdiction or where the real property is located extra-territorially. More problematic are the sub-rules allowing for service *ex juris* involving contract, tort, claims, the "damages sustained in" provision and injunctive relief, which read as follows:

Contracts

(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*;

Tort Committed in Ontario

(g) *in respect of a tort committed in Ontario*;

Damage Sustained 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*;

Injunctions

(i) *for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario*;

Rules 17.02(f) and (g) are inapplicable to foreign real property insofar as contracts for the foreign sale of land are subject to the *Moçambique* rule and torts involving foreign immovables, such as nuisance or trespass, cannot be committed *in* Ontario. For example, in *Canadian Bronze Co. v. Shrum*[30] the court held that a claim that the foreign

assignees from the defendant of certain patents held for them in trust did not constitute an allegation of conversion and was, therefore, not a claim for a tort committed or damages sustained in Ontario. However, subrules 17.02(h) and (i) both bear scrutiny based upon the substantive/procedural dichotomy and the flexible nature of equitable remedies.[31] In the case of land, the application of the *Moçambique* rule offers ease of application and predictability of outcome, since it delegates both a regulatory function for local authorities over public registers and a supervisory role for local courts over all transactions affecting land within state boundaries.[32] T.M. Yeo in *Choice of Law for Equitable Doctrines* explained the rationale for the *Moçambique* rule as follows:[33]

30. (1980), 17 C.P.C. 241 (Ont. S.C. (Master)).
31. Subrules 17.02(o) (Necessary or Proper Party) and 17.02(q) (Counterclaim, Crossclaim or Third Party Claim) of the Ontario rules are *pro tanto* procedural. *Cf. Uniform Court Jurisdiction and Proceedings Transfer Act (UCJPTA) Comment to Section 10-10.3*, which intentionally omits the "necessary or proper party" criterion for presumed real and substantial connection on the rationale that: "such 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 under paragraph 3(d). 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 in paragraph 3(e)."

    Sub-rule 17.02(p) of the Ontario Rules (Person Resident or Carrying on Business in Ontario) simply reiterates presence-based jurisdiction: Ontario Rules, R.R.O. 1990, Reg. 194, rule 17.02; O. Reg. 171/98, s. 2; O. Reg. 131/04, s. 9. See also *Fasig-Tipton Co. v. Willmot and Burns*, [1969] 2 O.R. 1 (S.C.), which held that one foreign party may not be served as a necessary or proper party (now subrule 17.02(o)) merely because another foreign party has attorned to the jurisdiction and accepted service. Presumably, this applies, *mutatis mutandis*, if one or more of the defendants have a presence in Ontario, including conducting business there. See also Walker, *Muscutt* Quintet, *supra*, footnote 11.
32. *Cf.* Michael J. Whincop, "Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law" (2000), 50 U.T.L.J. 41 at p. 42 where the author suggests that property law serves three functions: (1) a definitive function — defining how entitlements are allocated and the means by which they are protected against non-parties; (2) an exchange function — how parties may trade entitlements; and (3) regulatory functions — regulation of the manner in which property may be used.
33. T.M.Yeo in *Choice of Law for Equitable Doctrines* (Oxford, 2004) at para. 5.02.

> Property choice of law rules seek to give effect to policies relevant to the protection of property rights, including the protection of the integrity and effectiveness of title recording systems, the protection of the expectations of the parties, security of vested rights, security of transactions, certainty and uniformity of results, and the ultimate control of the *situs* in the enforcement of court orders . . . Additional considerations applying to immovable property are that the court of the *situs* has the ultimate control over interests in immovables, and respect for the interests of social and economic policies of the *situs* in the transmission of rights in immovables.[34]

It is also most likely to be the *forum conveniens* and facilitates prospective enforcement of any judgment.[35]

34. In *Murakami Takako v Wiryadi Louise Maria and Others*, [2008] SGHC 47 (Singapore High Court), available online at: <http://lwb.lawnet.com.sg/legal/lgl/rss/supremecourt/56519.html>, affd [2008] SGCA 44 (Singapore Court of Appeal), online at: <http://lwb.lawnet.com.sg/legal/lgl/rss/supremecourt/59551.html> (accessed January 27, 2009) the plaintiff, Murakami, brought a motion to amend her Statement of Claim to include claims against foreign properties owned by one of the defendants, Takashi Murakami Suroso, situated in Australia and Indonesia and moneys held in two accounts with Westpac Bank in Australia, the latter of which were held to be justiciable by the Singapore High Court. Since the proposed amendments involved foreign immovable property, Ang J. thoroughly canvassed the history of the *Moçambique* rule and the *in personam* exception and held that: "The exception does not apply in this case because I am not satisfied that the relationship between the parties ought to be governed by the equitable standards of this court. Put in another way, the exception only applies when the court of equity is of the view that the relationship between the parties has a connection with the forum that will warrant equity lending her assistance to the dispute."

35. *Cf.* the Uniform Law Conference of Canada (ULCC) uniform statute, the *Uniform Court Jurisdiction and Proceedings Transfer Act* (UCJPTA), which rejects the concept of service-based jurisdiction and implements uniform statutory rules by which courts establish jurisdiction over particular proceedings. The UCJPTA expressly adopts the *lex situs* rule: see §§10(a), (c)(i), (e)(iii)(A)-(B) and (i)(i)-(ii). See also Antonin I. Pribetic, "'Thinking Globally, Acting Locally': Recent Trends in the Recognition and Enforcement of Foreign Judgments in Canada", in Archibald and Echlin, eds., *Annual Review of Civil Litigation 2006* (Toronto: Carswell, 2007), pp. 141-99 at 152-55.

    Cf. the ULCC's *Uniform Enforcement of Foreign Judgments Act*, ss. 8(f) and 9(c), which provide: "A court in the State of origin has jurisdiction in a civil proceeding that is brought against a person if (f) there was a real and substantial connection between the State of origin and the facts on which the proceeding was based." and "For the purposes of paragraph 8(f), in the case of a foreign judgment allowed by default, a real and substantial connection between the State of origin and the facts on which the civil proceeding was based is established in, but is not limited to, the following cases: *(c) the claim was related to a dispute concerning title in an immovable property located in the State of origin*" (emphasis added).

(2) The Moçambique Rule as a Rule for Establishing Subject-Matter Jurisdiction

Professor McLeod has emphasized the important conceptual distinction between contractual and property claims, noting that the *Moçambique* rule is a rule of property law.[36] In addition to the plaintiff seeking an equitable remedy, equitable jurisdiction requires "the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of the Court of Equity . . . would be unconscionable".[37] Thus, the local court having *in personam* jurisdiction acts upon the conscience of the defendant to subject the defendant to the court's equitable jurisdiction. The most obvious juridical power lies in the local court's equitable jurisdiction to issue contempt orders.[38] In the United States, the *in personam* exception applies where the plaintiff seeks an equitable remedy, including injunctive relief to prevent further trespass on foreign real property.[39] In *Deschamps v. Miller*, Parker J. held that the *in personam* exception was dependent[40]

> [O]n the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property.

The *Moçambique* rule applies equally in relation to personal jurisdiction as it does to subject-matter jurisdiction, the latter of which operates as a jurisdictional bar, unless the plaintiff can meet the four prerequisites underlying the *in personam* exception:[41]

> Where a plaintiff brings proceedings in connection with a foreign immovable, the resolution of the jurisdictional issue should depend on

36. McLeod, *supra*, footnote 3, at pp. 317-19 and p. 322, note 24, citing *Penn v. Baltimore*, *supra*, footnote 9 and *Cook Industries Inc. v. Galliher*, [1978] 3 All E.R. 945 (Ch. D.).
37. *Deschamps v. Miller*, *supra*, footnote 9, at p. 863.
38. See *Pro Swing Inc. v. Elta Golf Inc.*, (2006), 273 D.L.R. (4th) 663 at paras. 30-31, [2006] 2 S.C.R. 612, 218 O.A.C. 339, *per* Deschamps J., affg 71 O.R. (3d) 566, [2004] O.J. No. 2801 (QL) (Ont. C.A.), revg 68 O.R. (3d) 443, 30 C.P.R. (4th) 165, [2003] O.J. No. 5434 (QL) (S.C.J.) *per* Pepall J.
39. *Ramirez de Arellano v Weinberger*, 745 F 2d 1500 at p. 1529 (U.S. Court of Appeals, D.C. Circ., October 5, 1984).
40. *Deschamps v. Miller*, *supra*, footnote 9, at p. 863, *per* Parker J.
41. McLeod, *supra*, footnote 3, at p. 328.

> the nature of the relief requested. Where a plaintiff seeks a declaratory judgment that he is entitled to an interest in, or possession of the foreign immovable, the court would lack jurisdiction to proceed. In this situation the plaintiff is requesting *in rem* relief since the court order is to affect not only the parties to the action but the world at large and is operative over the land itself.

The following economic and policy-based rationales for the *Moçambique* rule are also germane:[42]

> Historically, courts have refused to exercise jurisdiction over a case involving a question as to the title to, or torts infringing, land situated outside the jurisdiction. The court does not, however, deny jurisdiction in cases which involve a contract in relation to foreign land or restitutionary suits. Although such a rule could simply be dismissed as an accident of history, it is more useful to regard the rule as an example of a narrow utilitarian approach to the exercise of jurisdiction. A rule denying jurisdiction over foreign land minimises the cost of judicial administration by excluding cases which are tangibly foreign. Distinguishing torts from contracts also flows from a unilateral definition of social welfare. Locals are likely to benefit from a wider jurisdiction to enforce contracts, as it reduces the transaction costs of dealing in land. The benefits associated with trade presumably accrue to parties within the jurisdiction. Torts, on the other hand, do not involve exchanges. Torts protect property entitlements; however, the benefit of that protection must primarily remain in the *situs*.

The extent to which the "real and substantial connection" test is applicable to foreign immovables is next considered.

Part III — The Muscutt Factors and the In Personam Exception: An Imperfect Fit

In *Muscutt*, Sharpe J. outlined three different grounds for establishing jurisdiction *simpliciter* over an out-of-province defendant, namely: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction:[43]

> Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the

42. Michael J. Whincop, "Three Positive Theories of International Jurisdiction" (2000), 24 M.U.L.R. 379 (citations omitted).
43. *Muscutt, supra,* footnote 12, at p. 586.

> jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.
>
> . . . . .
>
> . . . Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to Rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, prior to *Morguard* and *Hunt*, assumed jurisdiction did not provide a basis for recognition and enforcement.

In lieu of presence-based or consent-based jurisdiction over a non-resident defendant, the court must first determine whether it *can* assume personal jurisdiction over the parties and subject-matter jurisdiction over the litigation. Only where a Canadian court properly assumes jurisdiction does it retain the inherent jurisdiction to decide whether it *should* assume both personal jurisdiction and subject-matter jurisdiction based upon the *forum non conveniens* doctrine.[44]

As noted by the Ontario Court of Appeal in *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, the "real and substantial connection" test is inapplicable to an extra-provincial defendant (and, by analogy, a foreign defendant) who is physically present in Ontario, such as a corporation incorporated outside Ontario but which conducts business in Ontario. The basis of the court's jurisdiction over such defendants is their physical presence in Ontario.[45] The Court of Appeal of Ontario's formulation of the "real and substantial connection" test in *Muscutt* arose from a series of tort cases where the plaintiffs relied upon the "damages sustained

44. *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at pp. 914 and 921, 102 D.L.R. (4th) 96, [1993] 3 W.W.R. 441 *per* Sopinka J. See also *Molson Coors Brewing Co. v. Miller Brewing Co.*, [2006] O.J. No. 4236 (QL), 83 O.R. (3d) 331, 37 C.P.C. (6th) 394 (S.C.J.) *per* Lederman J.

In *Muscutt, supra*, footnote 12, Sharpe J.A. at p. 594 cites with approval the two-step jurisdictional analysis of Aitken J. in *Lemmex v. Bernard* (2000), 51 O.R. (3d) 164 (Div. Ct.), which held that: "[T]he question of whether Ontario has jurisdiction to hear these actions is a different question from whether this court should decline to exercise its jurisdiction because another forum is the more convenient forum. Using other terminology, the concept of jurisdiction *simpliciter* is different from that of *forum non conveniens*. The second question of whether Ontario should decline to exercise jurisdiction because another forum is the more convenient forum only needs to be considered once an Ontario court has determined that it has jurisdiction to hear the action."

45. *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, [2003] O.J. No. 560 (QL), 233 D.L.R. (4th) 627, 63 O.R. (3d) 431 (C.A.), leave to appeal to S.C.C. refused 232 D.L.R. (4th) vi.

in" rule as a means for assumed jurisdiction over foreign defendants.[46] In *Muscutt*, Justice Sharpe identified eight relevant factors for assuming jurisdiction over foreign defendants in circumstances where consent-based or presence-based jurisdiction was notably absent. It would appear that Professor McLeod's first prerequisite for the *in personam* exception does not apply to assumed jurisdiction. Specifically, *in personam* jurisdiction must be exercisable over the defendant(s) based upon either:

(1) presence-based jurisdiction (*i.e.* "The plaintiff must accordingly be able to serve the plaintiff with originating process") — albeit this no longer applies to service-based or "tag" jurisdiction following *Muscutt*[47] — or

(2) consent-based jurisdiction (*i.e.* "the defendant must submit to the jurisdiction of the court") which also may not apply if the remedy sought is declaratory in nature, discussed *infra*.[48]

In *War Eagle Mining Co. v. Robo Management Co.*,[49] Saunders J. expressed the relationship between the "real and substantial connection" test and the *Moçambique* rule in the following terms:[50]

> In terms of the "real and substantial connection" test, where the subject matter of the dispute is a foreign immovable, the connection between the foreign jurisdiction and British Columbia will be too tenuous to satisfy the jurisdictional test of *Tolofson v. Jensen*. The underlying rationale for courts leaving issues of title, rights and interest in a foreign immovable to be resolved in the foreign jurisdiction is consonant with the rationale expressed in *Tolofson v. Jensen* and the cases which foreshadowed that decision.

Saunders J. further emphasized that the "*exercise of in personam jurisdiction, however, operates in circumstances in which the defendant resides within the jurisdiction and is, therefore, within the reach of the court's enforcement powers*".[51] Alternatively, it is arguable that

46. Walker, *Muscutt* Quintet, *supra*, footnote 11.
47. In *Muscutt*, *supra*, footnote 12, the court at paras. 50 and 52 found that rule 17.02 (service *ex juris*) is merely procedural, ensuring that: "parties to an action receive timely notice of the proceeding so that they have an opportunity to participate [since there are] well-established legal standards governing jurisdiction that must be satisfied notwithstanding the fact that the defendant has been served in accordance with the Rule. In my view, the same conclusion follows for Rule 17.02(h), which must now be read as being subject to the real and substantial connection requirement."
48. See *Precious Metal*, *supra*, footnote 14 and discussion, *infra*.
49. (1995), 13 B.C.L.R. (3d) 362, [1996] 2 W.W.R. 504, 44 C.P.C. (3d) 118 (B.C.S.C.) *per* Saunders J.
50. *Ibid.*, at p. 366.

Professor McLeod's four prerequisites render the *Muscutt* factors for assumed jurisdiction superfluous, in the context of contractual or property claims involving foreign immovables, as illustrated by the following comparison chart:

Professor McLeod's 4 pre-requisites for the in personam exception	*The Muscutt 8-factored "real and substantial connection" test for assumed jurisdiction*
1. The court must have *in personam* jurisdiction over the defendant(s).	(1) the connection between the forum and the plaintiff's claim,[52] and (2) the connection between the forum and the defendant[53]
2. There must be some personal obligation running between the parties.	(3) the unfairness to the defendant in assuming jurisdiction,[54] (4) the unfairness to the plaintiff in not assuming jurisdiction; (5) the involvement of other parties to the suit;[55]
3. The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment.	(6) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;[56] (7) whether the case is interprovincial or international in nature;[57]
4. The court will not exercise jurisdiction if the order would be of no effect in the *situs*.	(8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.[58]

Recently, the Court of Appeal for Ontario tacitly approved the foregoing comparative analysis, noting:[59]

> The comprehensive approach to the determination of whether an Ontario court should assume jurisdiction outlined in *Muscutt* is fully capable of taking into account the factors relating to the nature of the remedy sought and identified in *Catania*. For example, factors three and four in *Catania* provide:

51. *Ibid.*
52. *Muscutt*, *supra*, footnote 12, *per* Sharpe J.A. at p. 605.
53. *Ibid.*, at pp. 605-606.
54. *Ibid.*, at p. 606.
55. *Ibid.*, at p. 607.
56. *Ibid.*, at p. 608.
57. *Sinclair v. Cracker Barrel Old Country Store Inc.*, *supra*, footnote 12, at para. 22; *Gajraj v. DeBernardo*, *supra*, footnote 12, at para. 23.
58. *Muscutt*, *supra*, footnote 12, *per* Sharpe J.A. at p. 610.
59. See *Precious Metal*, *supra*, footnote 14, at paras. 21-23 and discussion, *infra*. It should be noted that the author's earlier draft of this article was referred to by appellants' counsel in the course of oral argument.

- The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment; and
- The court will not exercise jurisdiction if the order would have no effect in the *situs*.

Both of these factors can be addressed under *Muscutt's* sixth and/or eighth factors:

- The court's willingness to recognize and enforce an extra provincial judgment rendered on the same jurisdictional basis.
- Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Recognizing that the real and substantial connection test is the single test for determining whether an Ontario court can assume jurisdiction over out of province defendants in no way diminishes the relevance of the *Catania* factors where the remedy sought affects foreign immovables. Performing the entire jurisdictional analysis within the real and substantial connection framework does, however, best achieve the flexibility and holistic inquiry favoured by *Muscutt*.

Arguably, the preferred conceptual approach is for the court to engage in subject-matter jurisdiction analysis based upon the *Moçambique* rule, *before* it considers whether it has personal jurisdiction over the foreign defendant(s) based upon the *in personam* exception and/or the *Muscutt* factors for jurisdiction *simpliciter*. Nevertheless, the *Muscutt* factors are firmly entrenched in the Canadian jurisprudential ethos. Accordingly, in the next section, I explore recent Canadian decisional trends involving jurisdictional challenges in cases involving foreign immovables, which suggest that the *Moçambique* rule and the *in personam* exception in Canada are in jeopardy. I conclude by proposing additional factors for a court's jurisdictional analysis, which reinforces the traditional distinction between subject-matter and personal jurisdiction in the context of claims involving foreign immovables.

(1) War Eagle Mining Co. v. Robo Management Co.[60]

The *War Eagle Mining* case involved a dispute over mineral claims in northern Saskatchewan between the petitioner, War Eagle Mining Company Inc., a B.C. mining company also registered extra-provincially in Saskatchewan, and Robo Management Co. Ltd., a Saskatchewan company with no offices in British Columbia. The

60. *War Eagle Mining*, *supra*, footnote 49.

petitioner had obtained an option to purchase 70 percent of six claims previously staked by the respondent. The parties agreed that any claims staked or acquired within a specified radius by either party were to be added to the property covered by the option agreement. The respondent refused to accept the petitioner's notice to terminate the option agreement. The petitioner commenced proceedings in British Columbia to resolve the issues. The respondent subsequently brought a declaratory trust action in Saskatchewan and concurrently sought a declaration that the British Columbia court had no jurisdiction to hear the petition or alternatively, declining jurisdiction in favour of Saskatchewan.

Justice Saunders allowed the application and stayed the B.C. petition on the ground of lack of jurisdiction. Saunders J. cited with approval both common law and statutory authority for the "proposition that mineral claims are part and parcel of land is well grounded in common law".[61] The court rejected the petitioner's argument that mineral claims, like company shares, were located in the *situs* of the transfer documents,[62] and held that the subject-matter of the dispute involved foreign immovables:[63]

> The mineral claims referred to in the petition are situate in Saskatchewan. Under the law of Saskatchewan they are chattels real and they are immovables. The question, then, is *whether their ownership is the subject matter of this dispute*.
>
> In my view, it is. The first declaration sought in the petition is of secondary interest to the petitioner; *the central question is whether the respondent has an interest in the disputed mineral claims. The action is in the nature of quieting the title to these claims, for if the respondents have no interest in the claims "arising by operation of the . . . agreement", they have no interest in the claims at all.*
>
> It is apparent that the *central interest* of the petitioner is to *vanquish the respondent's claim to some or all of the disputed mineral claims*. This object is apparent in an option agreement struck between the petitioner and a major mining company, concerning these claims, in which a penalty accrues to the petitioner in the event title to the mineral claims is not made certain by a particular date.

61. *Ibid.*, at para. 20 *per* Saunders J., citing with approval *Barinds v. Green and Silverman* (1911), 16 B.C.R. 433 (S.C.), the Saskatchewan *Mineral Disposition Regulations, 1986* and *Uranerz Exploration and Mining Ltd. v. Blackhawk Diamond Drilling Inc.* (1989), 80 Sask. R. 125, [1990] 1 W.W.R. 503 (Q.B.).
62. *Ibid.*, at para. 21, *per* Saunders J.
63. *Ibid.*, at paras. 23-25, *per* Saunders J.

(2) Khan Resources Inc. v. W M Mining Co., LLC[64]

In the Court of Appeal decision in *Khan Resources*, the applicants, Ikh Tokhoirol Ltd. and Altangol Exploration Ltd., two Mongolian corporations, and CAUC Holding Company Ltd., a British Virgin Islands corporation, owned mining interests in three Mongolian properties. The respondent Mays, a Colorado resident and principal of W.M. Mining Co., a Colorado corporation, spearheaded the acquisition and development of the Mongolian mining interests. Mays incorporated the applicant, Khan Resources Inc., in Ontario (Khan Ontario) to raise equity financing for the development of the mining properties in Mongolia. Pursuant to a share exchange agreement, Khan Ontario acquired all of the issued shares of the applicant, Khan Bermuda, a Bermuda corporation, the parent company of Ikh Tokhoirol, Atangol and CAUC. On October 3, 2004, a board of directors meeting was held with Mays in attendance, at which time Mays executed assignments transferring the assigned assets of W.M. to satisfy a debt allegedly owing to Khan Ontario.

The applicant companies commenced an application for a declaration that the three assignments in favour of W.M. were invalid and requested injunctive relief restraining the respondents, Mays and his company, W.M., from dealing or interfering with subject-matter of three assignments. Mays and W.M. then brought a motion for an order setting aside service and staying the application on grounds that no real and substantial connection existed between subject-matter of the action and Ontario. Justice Pepall granted the motion and stayed the application. Interestingly, the motions judge applied the *Muscutt* factors without any reference to the *Moçambique* rule or the *in personam* exception.[65] The Court of Appeal for Ontario dismissed the appeal. Feldman J.A., speaking for the unanimous court, approved the motion judge's jurisdictional analysis for assumed jurisdiction, noting that:[66]

> I agree with the conclusion reached by the motion judge. She articulated the ["real and substantial"] test properly, considered the relevant [*Muscutt*] factors and was correct in her determination that the Ontario court should not take jurisdiction in this case. *That conclusion is driven by the specific nature of the relief claimed in the application.*

64. *Khan Resources Inc. v. W M Mining Co., LLC* (2006), 208 O.A.C. 204, 79 O.R. (3d) 411, [2006] O.J. No. 845 (QL) (C.A.), affg 2005 CarswellOnt 8240 (Ont. S.C.J.).
65. *Khan Resources Inc. v. W M Mining Co., LLC*, 2005 CarswellOnt 8240 (Ont. S.C.J.) (April 19, 2005) *per* Pepall J.
66. *Khan Resources* (C.A.), *supra*, footnote 64, at para. 10 (emphasis added).

In characterizing the claims as property-based in nature, Justice Feldman held that the Mongolian licences[67]

> appear to be in the nature of a *profit à prendre*, an interest in land that entitles the holder to enter onto the land of another and exploit a natural resource there . . . Since the licenses in this case involve rights to land, the general rule is that "the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country": *Duke v. Andler*, [1932] S.C.R. 734 at 738.

Citing Laskin J.A. in *Catania v. Giannattasio*,[68] the court held that no *in personam* claim for damages existed that brought the application within the Superior Court's jurisdiction. In a sense, the court has emphasized comity (and perhaps reciprocity) as a predominant factor in declining jurisdiction:[69]

> In accordance with this rule of private international law, the unchallenged expert evidence in the record is to the effect that a Mongolian court would not recognize an Ontario judgment that purported to deal with these mining interests.
>
> In contrast, had the appellants sought the remedy of damages against the respondents based on an allegation that they breached a contractual or equitable obligation associated with the impugned assignments, even though the underlying asset is rights in foreign lands, an Ontario court could exercise *in personam* jurisdiction over the respondents by enforcing a personal obligation rather than purporting to determine the rights to mining interests in a foreign jurisdiction.

Khan Ontario also argued that it suffered damages in terms of moneys it paid for the mining interests as well as the loss of potential investors because of the impugned assignments. The court demurred in deciding whether to decline jurisdiction on this ground, noting that the pleading, as currently framed, was a derivative claim, not a claim for damages.[70] Ultimately, the applicants' election to seek declaratory and injunctive relief, rather than an *in personam* damages claim, was determinative:[71]

> In summary, it appears that the strongest factor militating against an Ontario court assuming jurisdiction is that the connection between the claim, as framed, and Ontario is very weak. Furthermore, even though it would be convenient for Khan Ontario to litigate here, the usefulness of any order obtained in Ontario in allaying the concerns of the equity

67. *Ibid.*, at para. 13 (some citations omitted).
68. *Supra*, footnote 9, at para. 11.
69. *Khan Resources* (C.A.), *supra*, footnote 64, at paras. 15-16.
70. *Ibid.*, at paras. 21-22.
71. *Khan Resources* (C.A.), *supra*, footnote 64, at paras. 23-24.

> market as to the ownership of the mining interests is dubious because it appears that any such order would not, by the ordinary rules of private international law, be enforceable in Mongolia in respect of the licenses, or in the British Virgin Islands in respect of the majority share interest of CAUC Holding Company Limited in Central Asian Uranium Company, Ltd.
>
> Therefore, although Mr. Mays came to Ontario from Colorado to raise money here to fund his Mongolian mining venture, because the relief the appellants seek in the action relates directly to enforcing rights with respect to foreign land and is declaratory and injunctive in nature, the relief would likely not be enforceable in the jurisdiction where it would need to be effective. Accordingly, I agree with the motion judge that it is the comity factor that effectively dictates the result in this case.

While the result is undoubtedly correct, it was unnecessary for the court to consider the *Muscutt* factors in order to stay the proceeding based upon a lack of subject-matter jurisdiction and breach of the *Moçambique* rule. In other words, the subject-matter of the dispute involved determination of rights or title to foreign real property. Moreover, the plaintiff failed to meet the first prerequisite under the *in personam* exception, once the court concluded that the claim was property-based in nature and not an *in personam* claim for damages.

(3) Mannix Resources Inc. (Trustee of) v. Mondial Corp.[72]

In *Mannix Resources*, the plaintiff's predecessor, Ridel Resources Inc., and the defendant, Mondial Corporation, entered into a share purchase agreement for the purchase of the issued and outstanding shares of Asia Pacific Energy Company Limited (APEC) for US$5,000,000 of which Mondial paid only US$150,000. The plaintiff claimed that Mondial and APEC then conspired to fraudulently encumber or convey to Focus Energy Ltd. (a British Virgin Islands corporation) and Sun Holding (Ltd.) Ridel's ownership interests to concessions from the Myanmar Oil and Gas Enterprise valued in excess of $21,000,000.

The plaintiff sought various forms of relief, including: (i) an order for rescission and a vesting order of right, title and interest in the concessions; (ii) a declaration that the shares of APEC and/or Focus and all interests in the concessions and all of the business and assets relating thereto were held by Mondial, APEC, Focus and/or Sun pursuant to an unpaid vendor's lien; and/or on a constructive trust on behalf of Ridel on the basis of breach of contract, breach of trust,

72. *Mannix Resources Inc. (Trustee of) v. Mondial Corp.*, [2006] B.C.J. No. 226 (QL), 146 A.C.W.S. (3d) 471, 2006 BCSC 175 (B.C.S.C.) *per* Burnyeat J.

equity, restitution or unjust enrichment; (iii) an order setting aside any assignments as fraudulent conveyances; and (iv) general and punitive damages. The plaintiff also requested an interim and permanent injunction against the defendants preventing them from dealing with or otherwise disposing the shares, concessions, or their business or assets, as well as a request for an accounting.[73]

Focus applied for a declaration pursuant to Rule 14(6)(a) of the B.C. *Rules of Court* that the court lacked jurisdiction, for a stay of proceedings and removal of Focus as a defendant in the style of cause. Focus' application was dismissed by the court, which held that the subject-matter of the dispute — pleaded as an actionable conspiracy claim —demonstrated a good arguable case against all of the defendants which established jurisdiction *simpliciter* based upon a real and substantial connection.[74]

Although the court cited the *War Eagle Mining* decision,[75] it did so only in the context of applicable law, opting to rely on a line of authority involving actionable conspiracy claims in class proceedings to assume jurisdiction over Focus.[76] Assuming *arguendo* that class action decisions with unique policy-based features have precedential value, the cases cited by the court involved neither foreign immovables nor declaratory relief.

Furthermore, the court's assumption of jurisdiction is somewhat surprising, insofar as the learned judge also referred to the decision in *AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah*,[77] which involved a dispute relating to an interest in a proposed mining development in Indonesia. In *A.G. Armeno Mines*, the British Columbia Court of Appeal upheld the lower court's dismissal of the plaintiff's claim for inducing breach of contract for lack of jurisdiction, and service *ex juris* was set aside based upon pleading

73. *Ibid.*, at paras. 4-6. The plaintiff also alleged intermeddling (perhaps champerty) against Focus and its solicitors in the bankruptcy of Ridel (now Mannix) by attempting to purchase several of the debts of Ridel: *ibid.*, at para. 7.
74. *Ibid.*, at paras. 9-18.
75. *Ibid.*, at para. 13, citing *War Eagle Mining*, *supra*, footnote 49.
76. *Ibid.*, at paras. 19-22, citing *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2002] O.J. No. 298 (QL) (Ont. S.C.J.); *Nutreco Canada Inc. v. F. Hoffman-LaRoche Ltd.* (2001), 10 C.P.C. (5th) 351, 14 C.P.R. (4th) 43 (B.C.S.C.) and *British Columbia v. Imperial Tobacco Canada Ltd.* (2005), 44 B.C.L.R. (4th) 125, 13 C.P.C. (6th) 272 (B.C.S.C.), affd 273 D.L.R. (4th) 711, [2006] 11 W.W.R. 191, 385 W.A.C. 17 (C.A.), leave to appeal to S.C.C. refused 276 D.L.R. (4th) vii.
77. *Ibid.*, at para. 22, citing *AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah* (2000), 77 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 173, [2000] 7 W.W.R. 209 (B.C.C.A.).

inadequacy. If the court had approached jurisdiction *simpliciter* from the starting point that *Moçambique* applied to the subject-matter of the litigation, it should then have analyzed the nature of the equitable remedies sought. If so, then the court should have declined jurisdiction, unless (a) the court dismissed the plaintiff's declaratory and injunctive relief; and (b) the *lex loci delicti commissi* for the actionable conspiracy was British Columbia, rather than simply that the plaintiff suffered damages in British Columbia for a tort committed elsewhere. [78]

(4) Minera Aquiline Argentina SA v. IMA Exploration Inc.[79]

In *Minera Aquiline,* IMA Exploration Inc., a B.C. exploration company, executed a confidentiality agreement in respect of its bid to purchase an Argentinean mining project owned by Newmont Mining Corporation. Ultimately, IMA chose not to bid and an Argentine exploration company, Minera Aqualine Argentina SA, ultimately purchased the mining project. However, prior to Minera's acquisition, IMA had staked other locations that disclosed viable mining prospects. Having acquired the sedimentary sampling data with its purchase of the mining project, Minera attempted to stake its claims, only to learn that IMA had already done so. At trial, Koenigsberg J. held that the defendant had breached its express duty of confidentiality in the confidentiality agreement, or alternatively, IMA had breached its common law duty of confidence.

The British Columbia Court of Appeal affirmed the trial judge's decision that the sedimentary sampling data was confidential information encompassed by the confidentiality agreement, and that IMA's unauthorized use constituted breaches of both the confidentiality agreement and IMA's common law duty of confidentiality owed to Minera.

The Court of Appeal upheld the trial judge's declaration of a constructive trust and imposition of a mandatory injunction against the defendant to transfer the mining claims over to the plaintiff. The British Columbia Court of Appeal's analysis of the issue of *in personam* jurisdiction is particularly cogent:[80]

78. The law of the place where the wrong (tort/delict) was committed; see *Wong v. Lee* (2002), 58 O.R. (3d) 398, 211 D.L.R. (4th) 69, 157 O.A.C. 340 (C.A.); *Somers v. Fournier* (2002), 60 O.R. (3d) 225, 214 D.L.R. (4th) 611, 162 O.A.C. 1 (C.A.).

79. *Minera Aquiline Argentina SA v. IMA Exploration Inc.* (2007), 43 C.P.C. (6th) 45, [2007] 10 W.W.R. 648, 406 W.A.C. 1 (B.C.C.A.), leave to appeal to S.C.C. refused December 20, 2007.

80. *Ibid.*, at paras. 89-93 (emphasis added).

> Aquiline's argument that the court's *in personam* jurisdiction is well established in Canadian law and was properly exercised by the trial judge is a complete response to the appellants' position. The authorities cited by Aquiline for the *in personam* exception to the rule that the court will not make orders affecting property interests in foreign lands are precedents binding on this Court.
>
> . . . . .
>
> Aquiline also notes that the academics who have criticized the categorization of claims to equitable interests in foreign land as *in rem* and *in personam* remedies have favoured the expansion of the court's jurisdiction to grant *in rem* relief, and not the elimination of the *in personam* exception: see Stephen Lee, "*Title to Foreign Real Property in Transnational Money Claims*" (1995), 32 *Colum J. Transnat'l Law* 607 at 610; Janeen M. Carruthers, *The Transfer of Property in the Conflict of Laws*, (Oxford: Oxford University Press, 2005) at 42-56.
>
> This academic opinion is consistent with the general trend of private international law . . .
>
> *In this case, the trial judge's order is enforceable in British Columbia against the appellants, who are British Columbia resident corporations. They will be required to carry out a transfer of the Navidad claims in Argentina under local law, but the courts of Argentina will not be involved. The appellants have not suggested there is any obstacle to carrying out the transfer.*

Clearly, the fact that the appellants were "British Columbia resident corporations" was determinative on the issue of *in personam* jurisdiction. *Quaere*: the same result if the appellants were foreign parties, but had previously attorned or submitted to the B.C. court's jurisdiction?

(5) Precious Metal Capital Corp. v. Smith

Perhaps the most intriguing case is the recent Ontario decision in *Precious Metal Capital Corp. v. Smith.*[81] In *Precious Metal*, the plaintiff, Precious Metal Capital Corp. (PMCC), an Ontario mining exploration company, required financing for the acquisition of two Peruvian properties, including the "Pachapaqui Mine". Pursuant to an agency agreement signed in Toronto and containing an Ontario choice of law and attornment clause, PMCC hired the defendant Peebles and his company, the defendant Haviland Management Inc. (Haviland Ontario), as its agent. Peebles then retained the Texan

81. (2008), 60 C.P.C. (6th) 276, [2008] O.J. No. 1236 (QL), 2008 CanLII 13794 (Ont. S.C.) *per* Lederman J. (April 2, 2008), affd *supra*, footnote 14.

defendant, Smith and his company, Taghmen Ventures Ltd. (Taghmen) to facilitate U.K. source financing (collectively referred to in the pleadings as the "Smith Group"). The loan documents relating to these advances contained a U.K. choice of law and exclusive jurisdiction clause.

At Peebles' suggestion, PMCC sent Smith a binder containing confidential information. Although Smith and PMCC never entered a formal agency agreement, PMCC claimed that the consideration paid for Smith's services in the form of shares delivered to Haviland Ontario "were to be owned beneficially by Peebles and Smith in equal shares".[82] Unable to maintain its interest in the Peruvian properties, PMCC then entered into negotiations to sell its stake in exchange for shares in the defendant, ICM Ltd. In the interim, the ICM shares were listed on the Alternative Investment Market of the London Stock Exchange while the asset purchase fell through. Eventually, the defendant Platinum Diversified Mining Inc. wholly acquired ICM in exchange for shares of Platinum. Ultimately, the defendant Haviland International Resources Ltd. (Haviland U.K.) acquired the Pachapaqui mine and sold it to ICM, which also pursued another of the Peruvian properties to the exclusion of PMCC.

PMCC then commenced proceedings in Ontario against the remaining defendants[83] seeking various forms of declaratory and injunctive relief, as well as damages in the alternative, for alleged breaches of fiduciary duty and breach of confidence. The defendants moved to dismiss or permanently stay the action for lack of jurisdiction pursuant to Rules 17.06 and 21(3)(a) of the Rules of Civil Procedure and s. 106 of the *Courts of Justice Act*. The defendants argued that the claim had no real and substantial connection to Ontario. In the alternative, the defendants submitted that jurisdiction ought to be declined because the parties expressly agreed to bring any claims or disputes concerning the transactions in question before the English courts and, in any event, Ontario was *forum non conveniens*. Finally, they submitted service on the foreign defendants was not justifiable under Rule 17.02 and should be set aside. The court applied the four prerequisites for the *in personam* exception and concluded that it had *in personam* jurisdiction over the defendants:[84]

> First, the court has jurisdiction over the defendants in this suit by virtue of s. 17.02(h) of the *Rules of Civil Procedure*. The suit alleges damages suffered in Ontario.
>
> Second, the requisite personal relationship for equity to operate is present. The defendant corporations are all controlled, directly or indirectly, by Smith and Peebles. The corporations' interests in the Peruvian properties are directly related to the defendants' alleged breaches of duty.
>
> Third, there is no barrier to this court supervising the execution of the judgment. It bears emphasizing, in light of the defendants' arguments, that this factor does not require the local court to facilitate or carry out the judgment. The transfers must be carried out according to the requirements of foreign law, whatever they may be, in order to comply with the Ontario court order.
>
> Fourth, the defendants have not established that there are any barriers to this transfer in the *situs*. Smith's reply affidavit states that registered owners of real property in Peru must be Peruvian, and that this is why he incorporated separate Peruvian companies to hold the properties. Foreign law is a fact that must be proven. There is no evidence to suggest that Smith is qualified to provide a legal opinion on Peruvian law, and his statement is not sufficient proof of the foreign law to satisfy me that the transfer of interest would be prohibited in the *situs*.
>
> In any event, there is no reason to think that PMCC could not take the same steps as Smith did and incorporate a Peruvian corporation to hold the properties, if necessary. If PMCC failed to take whatever steps were necessary to facilitate the transfer, it is unlikely that PMCC would have much success in holding the defendants in contempt of the equitable order.

The defendants appealed. The Court of Appeal for Ontario dismissed the appeal, affirming Justice Lederman's dismissal of the defendants' motion for stay.

With utmost respect, both the lower court and appeal decisions in *Precious Metal* are problematic for a number of reasons.

First, as mentioned above[85] the Court of Appeal agreed that subrule 17.02(h) of the Ontario rules does not confer jurisdiction and is merely a procedural mechanism notifying an out-of-province defendant and providing an opportunity to participate.[86] The mere fact that the plaintiff alleges that it suffered damages in Ontario is neither a necessary nor sufficient condition for jurisdiction *simpliciter* based upon assumed jurisdiction. Professor McLeod's first prerequisite for the *in personam* exception remains apposite: "[t]he

82. *Precious Metal*, *ibid.*, at para. 6.
83. Initially, the plaintiff named 15 defendants, 13 of which were non-residents, but prior to the motion discontinued the action against six of the foreign defendants. *Precious Metal*, *ibid.*, at para. 3.
84. *Precious Metal*, *ibid.*, at paras. 27-31.
85. *Supra*, footnote 47.
86. *Precious Metal* (C.A.), *supra*, footnote 14, at para. 19.

plaintiff must accordingly be able to *serve the defendant with originating process*, or the *defendant must submit to the jurisdiction of the court*". (emphasis added). In other words, the defendant must either be resident within or consent to the court's jurisdiction (by agreement, submission or attornment). Conversely, the test for establishing *jurisdiction simpliciter* based upon a "real and substantial connection" applies only where consent-based or presence-based jurisdiction is notably absent. Hence, whether or not a court *can* assume jurisdiction is a fundamentally different question from whether a court *should* assume jurisdiction in a case involving foreign real property. The principles of private international law — comity and sovereignty — and international (or transnational) public policy not only promote "order and fairness", they militate against assuming jurisdiction over foreign defendants in litigation involving foreign real property. As stated by Major J. in *Beals v. Saldanha*, "Modern ideas of order and fairness require that a court must have *reasonable grounds* for assuming jurisdiction where the participants to the litigation are connected to multiple jurisdictions."[87] The import of the Court of Appeal's decision is to engraft the *Muscutt* factors onto the *Moçambique* rule and *in personam* exception as follows:[88]

> Recognizing that the real and substantial connection test is the single test for determining whether an Ontario court can assume jurisdiction over out of province defendants in no way diminishes the relevance of the *Catania* factors where the remedy sought affects foreign immovables. Performing the entire jurisdictional analysis within the real and substantial connection framework does, however, best achieve the flexibility and holistic inquiry favoured by *Muscutt*.

However, the Court of Appeal provides little guidance on how or when subject-matter jurisdiction (*i.e.* the *Moçambique* rule and *in personam* exception) enters into the jurisdictional analysis — *i.e.* before or after the *Muscutt* factors are applied. The Court of Appeal decision also does not articulate what constitutes *reasonable grounds* for assuming jurisdiction involving a claim over foreign immovables. It may be possible for a Canadian court to apply the *Muscutt* factors and conclude that it may assume jurisdiction over non-resident defendants, yet not have subject-matter jurisdiction over the dispute based upon the *Moçambique* rule.

Second, the Court of Appeal accepted the motion judge's

87. *Beals v. Saldanha*, [2003] 3 S.C.R. 416 at para. 22, 234 D.L.R. (4th) 1, 182 O.A.C. 201 (emphasis added).
88. *Precious Metal* (C.A.), *supra*, footnote 14, at para. 23.

conflation of the issues of subject-matter jurisdiction and personal jurisdiction when applying Professor McLeod's four prerequisites for the *in personam* exception to the *Moçambique* rule. However, limiting the application of the *Moçambique* rule simply as a personal jurisdiction issue belies its significance in determining subject-matter jurisdiction, rather than simply one aspect of an exercise of "characterization"[89] in conflict of laws analysis, exemplified in the lower court's *forum non conveniens* analysis:[90]

> *The original agency relationship between PMCC and Peebles,* is strongly rooted in Ontario and contained an Ontario attornment clause. The actions of Peebles and Smith took place in Ontario, Texas, London, and Peru. *The property in issue is in the U.K. and Peru.* Each of these jurisdictions contains relevant documents.

In fact, the Court of Appeal effectively merged the jurisdictional inquiry altogether, stating:[91]

> *I see no analytical advantage, where as in this case and Catania in personam jurisdiction is asserted, in conducting a discrete jurisdictional inquiry based upon the nature of the remedy sought. Furthermore, treating the criteria in Catania as distinct from the broader jurisdictional inquiry mandated by the real and substantial connection test creates a problem.* The first of the four criteria set down in *Catania* provides:
>
> The court must have *in personam* jurisdiction over the defendant.
>
> . . . . .
>
> *In personam* jurisdiction, which is not based on the presence of the defendant (as it was in *Catania*) or the defendant's attornment to the jurisdiction, can exist only where there is a sufficient connection between the action and Ontario to warrant assumption of jurisdiction over that action by the Ontario court. The real and substantial connection test measures the sufficiency of that connection. Consequently, in cases of assumed jurisdiction, what is described in *Catania* as the first of four prerequisites to jurisdiction in fact requires a determination of whether on the totality of the circumstances there is a real and substantial

89. See generally, Castel and Walker, *supra*, footnote 3, vol. 1, c. 3, "Characterization and the Incidental Question" and c. 6, "Substance and Procedure", §6.2, p. 6-2, where Professor Walker notes that "[t]he distinction between substance and procedure, or right and remedy, is an important subject of characterization . . . The characterization of a particular rule, whether foreign or domestic, as substantive or procedural, cannot be done in the abstract because substance and procedure are not clear-cut or unalterable categories."
90. *Precious Metal* (S.C.), *supra*, footnote 81, at para. 57 (emphasis added).
91. *Precious Metal* (C.A.), *supra*, footnote 14, at paras. 18-20.

connection between Ontario and the action so as to justify the assumption of *in personam* jurisdiction. In other words, the first criterion identified in *Catania* calls for the much broader inquiry mandated by the real and substantial connection so clearly explained in *Muscutt*.

Third, the Court of Appeal agreed with the motion judge's characterization of the remedies sought by PMCC as essentially a constructive trust over either the defendants' interest in the Peruvian properties, or the shares in ICM and Platinum, or an injunction restraining further transfers of these interests, noting:[92]

> The characterization of the plaintiff's claim was an important step in the determination of whether the Ontario court had jurisdiction. The appellants argued on the motion and again on appeal, that the plaintiff's claims, in their essence, alleged breaches of a series of agreements between the plaintiff and various defendants. Many of those agreements contained provisions giving the English courts exclusive jurisdiction over disputes arising out of the agreements. The appellants argued that these exclusive-jurisdiction provisions applied to the plaintiff's action. On the appellants' submissions, the exclusive jurisdiction provisions provided a strong argument both against the assumption of jurisdiction and, if jurisdiction was taken, the further determination that Ontario was the most appropriate forum: see *Z.I. Pompey Industrie v. E.C.U.-Line N.V.*, [2003] S.C.J. No. 23 . . . at para. 20.
>
> The characterization of the claims depends in large measure on the contents of the statement of claim. That document is long and in some respects unclear. The motion judge reviewed the claim and the additional material filed on the motion. He did not accept the appellants' contention that the plaintiff's lawsuit was in essence a series of claims based on alleged breaches of the contracts. He characterized the claim in this way at paras. 19-20:
>
> > I accept the plaintiff's characterization *of this claim as, in pith and substance, centering on the fiduciary relationship between PMCC and Peebles and Smith. The allegation is that the two deliberately orchestrated events to put PMCC at a disadvantage, to ultimately pursue the Peruvian opportunities in their own interests.* The objects of an agency relationship should not be the sole determinant of that relationship's character.
> >
> > This alleged orchestration included improprieties in preparing and executing the loan advance documents and the Asset Purchase Agreement. *However, this case is not about Smith's loans to PMCC or the Asset Purchase Agreement: it is about an allegedly abusive course of conduct by fiduciaries. The suit is not contractual in substance.* Although PMCC has specifically pleaded a breach of

92. *Ibid.*, at at paras 9-12.

> > the Asset Purchase Agreement, on a review of the Amended Statement of Claim as a whole, *I am satisfied that the references to the loan advances and Asset Purchase Agreement serve as illustrations or iterations of the defendants' breaches of their duties of confidence, loyalty and good faith and as part of a broader narrative of abusive conduct.* [Emphasis added.]
>
> I agree with the motion judge's characterization of the claim.
>
> The other significant feature of the claim for jurisdictional purposes arises out of the remedies sought by the plaintiff. In essence, the plaintiff seeks orders in the nature of disgorgement of the profits the defendants gained as a result of the alleged breaches of their duties to the plaintiff. The disgorgement takes the form of a constructive trust over any interest any of the defendants have in the Peruvian properties, or a constructive trust over the shares in various foreign corporate defendants.

The Court of Appeal added that:[93]

> [A]lthough the motion judge treated the real and substantial connection inquiry as discrete from and following upon the consideration of the *Catania* factors, *there is no reason to think that his analysis would have been any different had he merged the two under the real and substantial connection banner.* I find no error in his analysis of the factors identified in *Catania*. In challenging his conclusion that the remedies sought did not preclude the assumption of jurisdiction in Ontario, the appellants contended that an Ontario court would have no ability to supervise the execution of the judgment, as that judgment related to the transfer of foreign shares or foreign land to the plaintiff. Like the motion judge, I do not agree that the assumption of *in personam* jurisdiction depends on the Ontario court's actual ability to order the transfer ownership of foreign property. The motion judge put it correctly at para. 29:
>
> > There is no barrier to this court's supervising the execution of the judgment. It bears emphasizing, in light of the defendants' arguments, that this factor does not require the local court to facilitate or carry out the judgment. *The transfers must be carried out according to the requirements of foreign law, whatever they may be in order to comply with the Ontario court order.* [Emphasis added]

However, in order to impose either a constructive trust or a prohibitive injunction against the foreign defendants, the court must primarily be able to exercise *in personam* jurisdiction. If PMCC's claims were limited to an equitable remedy in the nature of a disgorgement of profits gained because of the breaches of duty, the *Moçambique* rule would not be engaged, and the *in personam*

93. *Ibid.*, at para. 24 (emphasis added).

exception would be without moment. However, PMCC's declaratory relief was not simply limited to a remedy of "disgorgement of profits". Rather, PMCC sought positive declarations that ICM's interests in the Peruvian properties and Pachpaqui Mine were beneficially owned or held in trust for PMCC and for "*an order directing that ICM transfer its interest*" to PMCC or that the shares held by the foreign corporations be "*registered in the name of the plaintiff*".[94] PMCC also requested an interim injunction preventing the defendants from transferring or disposing of their interest in the Peruvian properties, the Pachapaqui Mine or in the share capital of ICM. Clearly, declaratory and injunctive relief of this nature goes to the root of the *Moçambique* rule; it attempts to impose positive obligations on the defendants to revert title back to PMCC indirectly, if not directly, by exercise of the court's *in personam* jurisdiction over the foreign defendants. Notably, Justice Lederman did not cite *Khan Resources* (C.A.) in his analysis on this issue, although the Court of Appeal did, noting:[95]

> The nature of the remedy sought in the action, particularly if the remedy relates to a foreign immovable such as land, will play an important and sometimes even determinative role in the application of the real and substantial connection test. However, remedy related considerations, such as those identified in the four-part test in *Catania*, should be considered within the broader context of the various factors identified as relevant to the real and substantial connection test: see *Khan Resources Inc. v. W.M. Mining Company* (2006), 79 O.R. (3d) 411 (C.A.) at paras. 7-10.

Fourth, the Court of Appeal expressly approved Justice Lederman's application of the *Muscutt* factors and his adoption of the plaintiff's characterization of the claim as exclusively fiduciary in nature, noting:[96]

> I also see no error in the motion judge's analysis of the *Muscutt* factors. I would, however, make one observation, that in my view fortifies the correctness of the decision reached by the motion judge. At para. 38 of his reasons, the motion judge described Smith's connection with Ontario as "more tenuous". There can be no quarrel with this description insofar as it compares Smith's connection to Ontario with that of Peebles. *I do not, however, think that this comparison is particularly germane to the jurisdictional inquiry.*
>
> Smith had a potentially significant connection to Ontario. On the plaintiff's allegations, he received confidential information from the plaintiff, an Ontario corporation. He agreed to work with Peebles on the business affairs of that Ontario corporation. Smith knew that Peebles, an Ontario resident, was the Ontario corporation's agent and was in a fiduciary relationship with that Ontario corporation. Although Smith was never in Ontario, it is fair to say that he became involved in a business relationship that he knew originated in and was centered in Ontario. Smith could well have foreseen an action in Ontario if the obligations and duties arising out of the business relationship to which he became a party were not honoured.

The problem, of course, is that exercise of characterization is sometimes a *fait accompli*, particularly where the defendant runs the risk of attorning or submitting to the jurisdiction if arguing the motion on the merits. Furthermore, the underlying agency relationship was between PMCC and Peebles and Haviland Ontario only; none of the remaining defendants were privies with PMCC. This begs the question whether any of the remaining defendants owed fiduciary duties or duties of confidence to PMCC independent of the formal agency relationship, albeit neither the lower court nor the appeal court referred to any principles of the law of agency in the respective analyses.[97]

Fifth, the Court of Appeal did not comment upon Lederman J.'s reliance on *Minera Aquiline* for asserting jurisdiction over the defendants on this basis: "[the respondent's] argument that the court's *in personam* jurisdiction is well established in Canadian law and was properly exercised by the trial judge is a complete response to the appellants' position". As noted above,[98] the defendant in *Minera Aquiline* was physically present in British Columbia, which begs the question on what other basis a court can assume jurisdiction over a foreign, non-attorning defendant in similar circumstances.

94. *Precious Metal* (S.C.), *supra*, footnote 81, at para. 11 (emphasis added). *Cf. War Eagle Mining*, *supra*, footnote 49, at para. 27 where Saunders J. held: "In asking for a declaration that the respondent has no interest in the claims arising from the agreement, a question which may appear as a question of contract interpretation, the petitioner asks whether the respondent has or has not an interest in the mineral claims. As in the *Moçambique* case, *supra*, footnote 4, *where the claim at first instance was presented as a declaration of entitlement to possession and occupation of land, the declaration sought by the petitioner speaks directly to ownership of a foreign immovable.*" (emphasis added).
95. *Precious Metal, ibid.*, at para. 17.
96. *Ibid.*, at paras. 25-26 (emphasis added).
97. In *Precious Metal* (S.C.), *supra*, footnote 81, at para. 39, the court held that "All of the foreign corporate defendants are controlled either directly or indirectly by Peebles or Smith and their liability is derivative." *Cf. Dominion Securities Ltd. v. Toronto Dominion Bank* (1981), 15 Man. R. (2d) 120 (Q.B.) (the fact that as the defendant bank's agent could be sued in Manitoba as a result of carrying on business there did not by itself render its foreign principal subject to the jurisdiction).
98. See discussion of *Minera Aquiline* decision in Part III, section (4) above.

Finally, the motion judge's view that the claim brought by most of the defendants against PMCC for declaratory and anti-suit injunctive relief did not constitute a "parallel proceeding" is a matter of semantics, since it is arguably a concurrent proceeding despite the fact that Peebles and Haviland Ontario were not plaintiffs in the U.K. action. The Court of Appeal did not consider the prospect that allowing both claims to proceed could result in a jurisdictional quagmire at the enforcement stage, particularly if the U.K. court accepts jurisdiction and makes a negative declaration that becomes final and binding on the Ontario plaintiffs before the Ontario proceedings are adjudicated. This scenario is not simply theoretical; the U.K. judgment may become enforceable against PMCC under the *Reciprocal Enforcement of Foreign Judgments Act, U.K.*[99]

However, PMCC has recently obtained an anti-suit injunction against the Ontario defendants in respect of the U.K. proceedings only.[100]

99. *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R-6 (*REJUKA*). *REJUKA* is the Ontario statute that brings into force in Ontario the *Convention between Canada and the United Kingdom for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, 1984*. It has been implemented in each of the common law Canadian provinces and territories. See *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, R.S.C. 1985, c. C-30. See also *Cavell Insurance Co. (Re)*, [2006] O.J. No. 1998 (QL), 269 D.L.R. (4th) 679, 80 O.R. (3d) 500 (Ont. C.A.) *per* M. Rosenberg, S.T. Goudge and J.M. Simmons JJ.A., May 23, 2006, supp. reasons 151 A.C.W.S. (3d) 27, which held that finality was no longer an absolute requirement for recognition and enforcement of a non-monetary order, presaging the Supreme Court of Canada's decision in *Pro Swing, supra*, footnote 38.

100. *Precious Metal Capital Corp. v. Smith*, 2008 CanLII 64008 (Ont. S.C.) *per* Campbell J. (November 29, 2008). In his reasons for decision, Campbell J. referred to conflicting expert opinions on the law of the United Kingdom in respect of the availability of the *forum non conveniens* doctrine in light of the European Member State Council Regulation 44/2001 (the 'Judgment Regulation') (also referred to as the "Brussels Regulation"). At paras. 30-33, Justice Campbell stated: "*It is not necessary to decide, as urged by the Plaintiff, that given the Application of a European Member State Council Regulation 44/2001 (the 'Judgment Regulation') applicable in England, the Courts of England are precluded from declining jurisdiction conferred on it by the Judgment Regulation on forum conveniens considerations.* It would indeed be remarkable if a Canadian Court were to consider the law of England in a complicated context that has not been considered by the Courts of England. I am satisfied it is not necessary to do so. The facts in this case in my view do not point to a preference that the Plaintiff before consideration of the Order sought, proceed in the United Kingdom with a motion to stay that action. I have reached this conclusion for the following reasons: 1. Ontario has been determined a convenient forum. 2. The action in Ontario is broader and more comprehensive than the United Kingdom action, and now with the Amended Statement of Claim will include all issues relating to the loan advances. 3. If required to proceed with a stay motion in the United Kingdom, the Plaintiff would be required to expend substantial funds in circumstances where it has demonstrated impecuniousness. 4. The Plaintiff would in my view be exposed to jurisdictional disadvantage if it were required to seek a stay in the United Kingdom. (i) *It is at risk that the expert opinion of the Plaintiff might preclude the United Kingdom court from consideration of forum conveniens arguments.* (ii) A United Kingdom judgment in favour of the Defendants on the loan issue would undoubtedly be used to try and prevent prosecution of the Ontario action until paid. (iii) The circumstances of a costly stay motion could significantly inhibit the prosecution of this action. 5. There is no apparent juridical disadvantage to the Defendants, assuming they intend to defend all the Plaintiff's claims on their merits. The claim on the loans if necessary to proceed as part of this action can be dealt with on the basis that the law of England will be part of the factual matrix." (emphasis added) However, it appears as though the learned judge is incorrect in his conclusion that PMCC would suffer a loss of juridical (jurisdictional) advantage if it were required to seek a stay in the United Kingdom. Since the Brussels Regulation only applies to Member States and Canada is neither a signatory to the Brussels Convention nor the Brussels Regulation, the United Kingdom court would not be precluded from consideration of *forum non conveniens* arguments. See *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (Official Journal L 012, 16/01/2001 P.) available online at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001-R0044:EN:HTML>. See also Antonin I. Pribetic, "CASE NOTE: Opinion of Advocate General Kokott in Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc. (Case C-185/07 delivered on 4 September 2008)", *Transnational Dispute Management (TDM)* (September 2008) (also appearing in *The Globetrotter*, OBA International Law Section Newsletter, Vol. 13, No. 1 (October 2008)), which addresses the status of *forum non conveniens* doctrine and anti-suit injunctions under the Brussels Regulation in the context of the pending decision of the European Court of Justice in *Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v. West Tankers Inc.*

At a minimum, the peradventure of a multiplicity of proceedings and potentially conflicting judgments is anathema to the four pillars of jurisdiction —sovereignty, comity, order and fairness.

Part IV — Conclusion

As the foregoing analysis attests, it is submitted that Canadian courts have misapplied, and at times, ignored the *Moçambique* rule and the *in personam* exception in the jurisdictional context. Part of the problem stems from a judicial preference to apply the *Moçambique* rule as exclusively a legal rule, while allowing for the *in personam* exception as a corollary to the "real and substantial connection" test and the *Muscutt* factors. I have argued that Professor McLeod's four

prerequisites for the *in personam* exception remain a relevant doctrinal basis for establishing jurisdiction *simpliciter* over foreign defendants in claims involving foreign immovables.

However, since Professor McLeod's first prerequisite only addresses presence-based and consent-based jurisdiction, the courts have sometimes resorted to the *Muscutt* factors to assume jurisdiction over property-based claims, which offends the *Moçambique* rule. The *Muscutt* factors for assuming jurisdiction should be limited to traditional non-property claims in lieu of service-based or consent-based jurisdiction. The process of characterization is ultimately discretionary.[101] However, the determination of jurisdiction *simpliciter* is not. Therefore, the following factors offer some guidance in the court's jurisdictional analysis:

1. If the plaintiff's claim is property-based, the *Moçambique* rule applies irrespective of whether consent-based jurisdiction or presence-based jurisdiction exists.
2. If the plaintiff's claim is contractual, tortious, or restitutionary in nature, the *in personam* exception only applies in circumstances where:
   (a) *consent-based jurisdiction* based upon submission or attornment over the foreign defendants(s) otherwise exists; or,
   (b) *presence-based jurisdiction* over the foreign defendants(s) otherwise exists; or
   (c) the remedies sought are exclusively *equitable* in nature, but do not include declaratory relief in respect of title to, or possession of, foreign immovables.
3. In any case, the court may not assume jurisdiction solely based upon procedural rules allowing for service *ex juris*, unless the local court has subject-matter jurisdiction or personal jurisdiction over the foreign defendant(s).

Whether the Court of Appeal in *Precious Metals* has now resigned the *Moçambique* rule and the *in personam* exception to the jurisprudential dustbin remains to be seen. It does, however, suggest that plaintiffs will have greater success in staking claims against foreign defendants in Canada in cases involving foreign real property.

101. *Cf. Pioneer Metals Corp. v. Pegasus Gold Inc.* (1990), 44 B.C.L.R. (2d) 79 (B.C.S.C.) *per* Campbell L.J. S.C. (in Chambers) and *Montagne Laramee Developments Inc. v. Creit Properties Inc.* (2000), 47 O.R. (3d) 729, 45 C.P.C. (4th) 345 (Ont. S.C.J.) *per* Pitt J.