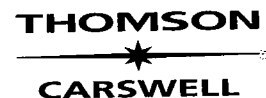
ANNUAL REVIEW OF CIVIL LITIGATION

2002

THE HONOURABLE JUSTICE TODD ARCHIBALD
ONTARIO SUPERIOR COURT
MICHAEL COCHRANE, LL.B.



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Beyond Real and Substantial Connection: The *Muscutt* Quintet

*Janet Walker**

I. INTRODUCTION

The Court of Appeal for Ontario has released decisions in five companion cases[1] that provide a detailed formulation of the factors to be considered in determining whether Canadian courts should assume jurisdiction over out-of-province defendants in claims for damage sustained in the province as a result of torts occurring elsewhere. The analysis of the real and substantial connection test as it applies in these kinds of claims provides an important opportunity to reconsider the test as it applies to cross-border claims generally. It also provides an important opportunity to reconsider the role that the real and substantial connection test serves in ensuring that jurisdictional determinations meet the constitutional requirements of the principles of order and fairness.[2]

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1 *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661 (Ont. C.A.); *Leufkens v. Alba Tours International Inc.* (2002), 213 D.L.R. (4th) 614 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661 (Ont. C.A.); *Lemmex v. Bernard* (2002), 213 D.L.R. (4th) 627 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661 (Ont. C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 213 D.L.R. (4th) 643 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661 (Ont. C.A.); and *Gajraj v. DeBernardo* (2002), 213 D.L.R. (4th) 651 (Ont. C.A.), additional reasons (2002), 213 D.L.R. (4th) 661 (Ont. C.A.).

2 The constitutional requirements of order and fairness in jurisdictional determinations were first enunciated in *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077. They were held to be constitutional imperatives in *Hunt v. T & N plc,* [1993] 4 S.C.R. 289.

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II. THE *MUSCUTT* QUINTET

The Court in *Muscutt v. Courcelles*[3] described the common fact situation that gave rise to the appeals as follows:

> An Ontario resident suffers serious personal injury in another province or in another country. The injured party returns home to Ontario, endures pain and suffering, receives medical treatment, and suffers loss of income and amenities of life, all as a result of the injury sustained outside the province. The question is whether the courts of Ontario should entertain the injured party's suit against the out-of-province defendants who are alleged to be liable in tort for damages.[4]

While this was the general question posed in all of the cases, it is worth noting the facts of each case, particularly when the differences between them can affect the analysis.

In *Muscutt,* the plaintiff had been injured as a passenger in a car that was involved in an accident that occurred shortly after he moved to Alberta to work on a contract basis for his Ontario employer. On his release from hospital, the plaintiff moved back to Ontario where, at the time of the claim, he was receiving extensive and ongoing medical care. Following the accident, the driver of the car in which the plaintiff was riding also moved to Ontario. The owners of both vehicles and the driver of the other vehicle remained in Alberta and they challenged the jurisdiction of the Ontario court. Accordingly, the particular question raised in *Muscutt* was whether an Ontario court could exercise jurisdiction over a claim for injuries suffered in a motor vehicle accident occurring in another province and involving defendants in that province in a situation where the plaintiffs and one of the defendants were now residents of the forum.

In *Leufkens v. Alba Tours International Inc.,*[5] one of the plaintiffs had been injured while on an excursion tour during a package holiday in Costa Rica. Mr. Leufkens was injured when his harness was modified for rappelling 50 feet to the ground from a platform. The Leufkens sued the Canadian package holiday companies, the Costa Rican company from which they purchased the excursion tour, the owner and operator of the excursion tour, the Red Cross of Costa Rica and the medical professionals who treated Mr. Leufkens in Costa Rica in the hours before he was flown back to Toronto. The Costa Rican company from which the Leufkens purchased the excursion tour challenged the jurisdiction of the Ontario court, but the Canadian package holiday companies did not. The other Costa Rican defendants did not respond to the notice of proceeding. Although the travel literature described the Canadian companies as having "partnered" with the Costa Rican company to provide the excursion tours, the motions court found that any such arrangement was contractual and was based in Costa Rica. Accordingly, the particular question raised in *Leufkens* was whether an Ontario court could exercise jurisdiction over a claim against a defendant from another country for injuries occurring in that other country in a situation where the plaintiffs and some of the defendants in the claim were residents of the forum.

In *Lemmex v. Bernard,*[6] one of the plaintiffs had been injured during a shore excursion on the Island of Grenada while on a Caribbean cruise vacation. Mr. Lemmex suffered carbon monoxide exposure from a vehicle in which he was riding. Sunflight Holidays Inc., a Canadian package holiday company, had sold the Lemmex family the airfare and cruise package and Premier Cruises Ltd., a Florida company, took the Sunflight clients and others on the cruise. Sunflight had provided pamphlets about the shore excursions, but the bookings were to be made on board the cruise ship. Premier had made arrangements with local companies for the shore excursions. The Lemmexes sued Sunflight and Premier, and Premier commenced a third-party claim against the Grenadian tour operator and the driver of the vehicle in which Mr. Lemmex was injured. The Lemmexes then commenced an action against the third-party defendants and the actions were consolidated. Premier had attorned to the jurisdiction of the Ontario court but the Grenadian defendants objected. Accordingly, the particular question raised in *Lemmex* was whether an Ontario court could exercise jurisdiction over a claim against a defendant from another country for injuries occurring in that other country where the plaintiffs and some of the defendants in the claim were residents of the forum and where another defendant had attorned.

In *Sinclair v. Cracker Barrel Old Country Store Inc.,*[7] the plaintiff had been injured in a slip and fall accident in a restaurant that was located near Buffalo, New York. The restaurant was part of a chain of restaurants with its head office in Tennessee. Within hours, the hospital sent the plaintiff to Toronto for surgery where she remained in hospital for over eight months. The Sinclair family sued and the restaurant challenged jurisdiction. Accordingly, the particular question raised in *Sinclair* was whether an Ontario court could exercise jurisdiction over a claim for injuries occurring in another country and involving defendants in that country where the individual plaintiffs were residents of the forum and the corporate defendant would otherwise be subject to the jurisdiction of the foreign courts nearby.

In *Gajraj v. DeBernardo,*[8] the plaintiff had been injured in a car accident in New York State involving two other cars. The Gajraj family sued the drivers of the other cars and the Gajraj's Canadian insurer, but the action against the insurer was severed from the action against the drivers of the other cars. The

3 *Muscutt v. Courselles, supra,* note 1.
4 *Muscutt, supra,* note 1 at 582.
5 *Leufkens, supra,* note 1.
6 *Lemmex, supra,* note 1.
7 *Sinclair, supra,* note 1.
8 *Gajraj, supra,* note 1.

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defendant drivers objected to the exercise of jurisdiction. Accordingly, the particular question raised in *Gajraj* was whether an Ontario court could exercise jurisdiction over a claim for injuries occurring in a motor vehicle accident in another country and involving defendants in that country where all the litigants were individuals and where a related local insurance claim was ongoing.

III. THE *MUSCUTT* FACTORS

Since the 1990 decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye,*[9] the constitutional requirements of order and fairness have permitted courts to exercise jurisdiction over matters with a real and substantial connection to the forum. In the *Muscutt* quintet, the defendants proposed an interpretation of the real and substantial connection test that focused solely on whether there were contacts between them and the forum. The Court of Appeal in *Muscutt* rejected this approach because it was concerned only with whether "it is reasonable to infer that the defendant has voluntarily submitted to Ontario's jurisdiction or where it was reasonably within the defendant's contemplation that his or her conduct could cause an injury in Ontario and give rise to a claim in Ontario courts."[10] The Court noted that this approach prevails in the United States as a result of the particular requirements of due process clauses of the United States Constitution.

According to the Court, this "personal subjection" approach was not broad enough to meet the concerns that have been shown in the Canadian jurisprudence. As the Court explained, it is "not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important."[11] Nevertheless, since "clarity and certainty" are also important, the Court identified eight factors that "are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative. Rather, all relevant factors should be considered and weighed together."[12]

The Court in *Muscutt* identified the following eight factors as relevant to determining jurisdiction:

a) the connection between the forum and the plaintiff's claim;
b) the connection between the forum and the defendant;
c) unfairness to the defendant in assuming jurisdiction;
d) unfairness to the plaintiff in not assuming jurisdiction;

9 *Morguard, supra,* note 2.
10 *Muscutt, supra,* note 1 at 596.
11 *Ibid.* at 603.
12 *Ibid.* at 604.

e) the involvement of other parties to the suit;
f) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
g) whether the case is interprovincial or international in nature; and
h) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.[13]

In applying these factors to the five cases, the Court held that jurisdiction should be exercised over the Alberta defendants in *Muscutt* and that jurisdiction should be declined in the other four cases over the foreign defendants that objected to trial in Ontario.

1. The Connection between the Forum and the Plaintiff's Claim

In all five cases, since the plaintiffs had been residents of the forum before they were injured, had received medical care in the forum for their injuries, and had suffered from their injuries there, it was held that there was a significant connection with the forum. However, in each of the cases, it was noted that this was only one of eight factors to be considered, and in any event, it would be difficult to justify the exercise of jurisdiction over a plaintiff's claim based solely on the plaintiff's residence in the forum.

With respect, it is not clear how subsequent suffering in the plaintiff's residence creates a connection between the claim and the forum. Connections to the forum usually have some bearing on liability. The fact that a plaintiff takes up residence in the forum after the injury occurs may be a matter of happenstance, and as a basis for jurisdiction, it could promote forum shopping.[14] As will be discussed further under the fourth factor, a concern for fairness to the plaintiff may warrant the assumption of jurisdiction, but this does not by inference created a connection between the forum and the plaintiff's claim.

2. The Connection between the Forum and the Defendant

It will be recalled that the defendants in *Muscutt, Leufkens* and *Lemmex* who had been served in Ontario, or who had attorned to the jurisdiction of the Ontario court, did not challenge jurisdiction. Accordingly, the connection between the defendant and the forum was assessed only in relation to the defendants that had been served solely on the basis of damage sustained in the jurisdiction.[15] In all five cases it was held that there was nothing in the defen-

13 *Ibid.* at 604-610.
14 See Vaughan Black, "Territorial Jurisdiction Based on the Plaintiff's Residence: *Dennis v. Salvation Army Grace General Hospital*" (1998), 14 C.P.C. (4th) 222.
15 *I.e.*, on the basis of Rule 17.02(h).

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dants' conduct that amounted to personal subjection to the forum. The approach to assessing this factor was drawn from the decision of the Supreme Court of Canada in *Moran v. Pyle National (Canada) Ltd.* in which the Court held:

> ... where a foreign defendant . . . knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.[16]

The Court of Appeal carefully distinguished cases in which "it was reasonably foreseeable that the defendant's conduct would result in harm in the jurisdiction" from those in which "the plaintiff returns and suffers consequential damage."[17] It is relatively unsurprising that the Court found that there was no connection between the forum and defendants who had been served on the basis of damage sustained in the province. Had there been such a connection, jurisdiction would have been exercised over the defendants on some other basis.[18] As *Moran* illustrates, situations in which it is reasonably foreseeable that the defendants' conduct would result in harm in the jurisdiction are generally regarded as wrongs that have occurred in the jurisdiction and therefore that permit jurisdiction to be exercised on that basis alone without consideration of the location of subsequently sustained damages.

3. Unfairness to the Defendant in Assuming Jurisdiction

In *Muscutt*, there was no unfairness to the defendants in assuming jurisdiction because the defendants' insurance coverage required the insurer to defend claims brought anywhere in Canada. In each of the other four cases, however, it was held to be unfair to the defendants for the Court to exercise jurisdiction. While the defendants were engaged in activities that had an inherent risk of injury to persons who might happen to be from Ontario, there was no evidence of insurance coverage that would defray the costs of litigating a claim outside the place where the injury occurred. It was also not within the reasonable expectation of the defendants that they would need to do so.

With respect, to the extent that this factor was not meant merely to replicate the analysis under the previous factor (*i.e.,* connections between the forum and the defendant) it would seem necessary to consider some additional facts affecting the fairness of exercising jurisdiction. For example, unfairness to the defendant could relate to the ability of the defendant to litigate the matter in Ontario. Although the Court did not advert to this directly, there would seem

16 *Moran v. Pyle National (Canada) Ltd.* (1973), [1975] 1 S.C.R. 393 at 409.
17 *Muscutt, supra,* note 1 at 605.
18 *I.e.*, on the basis of Rule 17.02(g).

to be a potential for unfairness to the defendants in *Gajraj*, who were individual motorists, and to the local tour providers in *Leufkens* and *Lemmex*, who were small businesses. This would seem to be a reasonable basis for declining to exercise jurisdiction against them even if the plaintiffs were unable to travel to litigate. However, with respect, it is less clear how it would be unfair in *Sinclair*, in the sense of being unduly burdensome, to require a chain of restaurants to defend a slip and fall claim in a court only a few hours drive from where the injury occurred, particularly since based on its location, the restaurant could well have relied substantially upon the patronage of persons from Ontario. Perhaps this apparent anomaly is best understood in terms of the need in some cases to analyze fairness to the parties as a balance of convenience.

In *Leufkens* and *Lemmex*, "fairness to the defendant" was assessed only in terms of the foreign defendants who objected to the exercise of jurisdiction. The fairness to the Canadian package holiday companies and the attorning Florida tour company, who were prevented from claiming over against others who could not be made parties to the litigation, was left to be assessed under the fifth factor — "the involvement of other parties to the suit".

4. Unfairness to the Plaintiff in not Assuming Jurisdiction

The Court noted the inconvenience of requiring an injured individual to litigate in another court, but in the four companion cases to *Muscutt*, in which jurisdiction was not exercised over the objecting defendants, the Court expressed the view that any potential unfairness was not significant in view of the reasonable expectations of the parties that a claim would be tried in the place where the injury occurred.

Although the Court gave this factor no particular prominence among the eight factors that it identified, in the "damage sustained in" cases, the potential for unfairness to the plaintiff in not assuming jurisdiction would seem to be the heart of the jurisdictional analysis. The parties may well expect that a claim would ordinarily be tried in the place where the injury occurred, but the "damage sustained in" cases are precisely those cases that raise the question of whether, despite this reasonable assumption, considerations of fairness warrant the exercise of jurisdiction by a court in another place.

Nevertheless, fairness to the plaintiff is probably best assessed relatively and contextually, and not as an isolated factor. It may be unfair to require the plaintiffs in *Muscutt* to pursue their claims in Alberta, but this is because the individual defendants' insurance provided for defence of litigation anywhere in Canada. This mandatory requirement for motor vehicle insurance entitles accident victims to seek recovery in their home province.[19] It may not be unfair to require the plaintiffs in *Leufkens, Lemmex* and *Gajraj* to pursue their claims

19 *Wawanesa Mutual Insurance Co. v. Lindblom* (2001), 200 D.L.R. (4th) 123 (Alta. C.A.).

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against the Costa Rican, Grenadian and American defendants in those countries, but this is, in part, because the plaintiffs were able to pursue independently viable claims against the Canadian package holiday companies and the Canadian insurer in Ontario. As this suggests, it makes sense to assess fairness to the plaintiff in the context of the remaining claims against defendants subject to the jurisdiction of the local court.

Indeed, in all but *Sinclair*, it seems that the potential for real unfairness to the plaintiffs did not arise because the plaintiffs were not deprived of the ability to pursue viable claims in Ontario. In *Sinclair*, it may have seemed unfair to require the individual plaintiffs to travel abroad to pursue their claims against a multi-state corporation who may well have relied on the patronage of just such individuals for its business. However, any hardship to the plaintiffs was reduced by the fact that the Sinclairs would have to travel only a short distance to sue in a relatively familiar legal system if the Ontario court declined jurisdiction. Accordingly, *Sinclair* illustrates that the relative impact on the parties and the context of remaining claims against parties subject to the jurisdiction may themselves not provide a complete basis for assessing fairness in exercising or declining jurisdiction. Perhaps fairness should ultimately be measured in terms of whether the decision not to exercise jurisdiction could prevent the plaintiff from pursuing the claim and, therefore, deny the plaintiff access to justice.

5. The Involvement of Other Parties to the Suit

As the Court explained in *Muscutt*,

> Where the core of the action involves domestic defendants, as in *McNichol*, the case for assuming jurisdiction against a defendant who might not otherwise be subject to the jurisdiction of Ontario courts is strong. By contrast, where the core of the action involves other foreign defendants, courts should be more wary of assuming jurisdiction simply because there is a claim against a domestic defendant.[20]

This factor was relevant only in *Leufkens* and *Lemmex*, in which the decision not to exercise jurisdiction over the objecting defendants did not deprive the plaintiff of a viable claim in the Ontario court. In *Leufkens* and *Lemmex*, it was held that the core of the action arose in Costa Rica and Grenada respectively. As mentioned above, the difficult question of whether defendants subject to the jurisdiction of the Ontario court should be deprived of the ability to claim against these foreign defendants was resolved in favour of the potential for separate actions in Costa Rica and Grenada.

20 *Muscutt, supra,* note 1 at 607.

The *Leufkens* and *Lemmex* cases were distinguished from *McNichol Estate v. Woldnik*[21] in which "an Ontario resident with a lengthy and complicated medical history suffered a fatal heart attack in Florida, one day after being treated by the appellant, a Florida chiropractor." In *McNichol*, the Court assumed jurisdiction over all the defendants, including the Florida chiropractor even though the claim might not have met the test for jurisdiction if it were constituted as a separate action. The Court in *Muscutt* observed that in *McNichol* the core of the action was a claim that arose in Ontario. With respect, while the concern for locating the core of the action may be significant for other bases of jurisdiction, it does not seem particularly relevant to jurisdiction in the damage sustained in cases, where it is exercised on the basis of fairness. On the contrary, the relevant question would seem to be whether the parties who were subject to suit in the forum would suffer a prejudice that would outweigh any unfairness involved in exercising jurisdiction over the foreign defendant.

6. The Court's Willingness to Recognize and Enforce an Extra-provincial Judgment Rendered on the Same Jurisdictional Basis

According to the Court, the assumption of jurisdiction sets the standard for reciprocity on the part of other courts. Even if this is not empirically verifiable, is seems to be a sound approach to jurisdictional determinations. It involves a court considering the issues in terms of the way in which they would affect similarly situated *local* defendants facing claims made against them in foreign courts. While this does not seem to be a separate factor so much as a sound approach to the factors already discussed, it helps to ensure a balanced assessment of the fairness to the parties in exercising or declining jurisdiction. For example, in cases in which local providers of tourism services (*Leufkens* and *Lemmex*), local restauranteurs (*Sinclair*) and local drivers (*Gajraj*) would be required to travel abroad to defend an action against them by one of their patrons, or by another driver, this approach can help to bring the fairness of the jurisdictional determination into sharp relief.

7. Whether the Case is Interprovincial or International in Nature

As the Court explained, the assumption of jurisdiction against defendants in other provinces is more easily justified than it is against defendants in other countries because there is a consistency and uniformity in the legal process in the alternative *fora* in Canada. It happened that in each of the *Muscutt* and companion cases, of the defendants who challenged jurisdiction, jurisdiction was exercised only against the Canadian defendants and it was declined against

21 *McNichol Estate v. Woldnik* (2001), 13 C.P.C. (5th) 61 (Ont. C.A.), leave to appeal refused (2002), 2002 CarswellOnt 1972, 2002 CarswellOnt 1973 (S.C.C.).

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the foreign defendants. Indeed, the correlation between this factor and the outcome in the various cases seems so much stronger than any other correlation, that some might speculate that the net practical result of these decisions is that jurisdiction exercised on the basis of damage sustained in the forum service is limited to interprovincial cases. However, such an interpretation would be unfortunate because it would not explain why access to justice was a relevant consideration in interprovincial cases but not in international cases.

8. Comity and the Standards of Jurisdiction, Recognition and Enforcement Prevailing Elsewhere

This factor applies only in international cases. The Court noted the relevance of the standards of jurisdiction prevailing in the defendant's location. However, it is unlikely that this was a recommendation that jurisdictional standards should be determined on the basis of reciprocity because reciprocity was rejected as a standard by the Supreme Court of Canada in the *Morguard* decision.[22] Instead, in the absence of evidence of the law in the place where the defendant was located, the Court in *Muscutt* assumed that any judgment issued by an Ontario court pursuant to jurisdiction exercised on the basis of "damage sustained in" the province would not be recognized or enforced in the defendant's home jurisdiction if this basis of jurisdiction was not among those that enjoyed broad international acceptance. The fact that the judgment issued would not be enforceable in other countries was said to be a good reason not to assume jurisdiction in these cases. Upon reviewing the prevailing rules in Australia and Europe, and those proposed by the Hague Conference on Private International Law,[23] the Court concluded that the prevailing international standards were "aimed at situating jurisdiction in the place in which the injury actually occurs,"[24] and not at extending it to include subsequent suffering in the place of the forum.

IV. "DAMAGE SUSTAINED IN" AND JURISDICTION

In order to understand how the introduction of the eight *Muscutt* factors to the real and substantial connection test helps to ensure that the exercise of jurisdiction accords with the principles of order and fairness, it is important to begin with the jurisdictional issue raised by the "damage sustained in" cases.[25]

22 *Morguard, supra,* note 2.
23 For information see <www.hcch.net/>.
24 *Muscutt, supra,* note 1 at 612.
25 Indeed, by not focusing on the particular issue raised by these cases, and instead trying to generate a broad multi-factor approach to cover all cases, the *Muscutt* decisions may well have substantially increased the complexity of jurisdictional determinations by appearing to create a requirement for counsel to address all eight factors in every request for stay or dismissal on jurisdictional grounds.

Rule 17.02 of the Ontario Rules of Civil Procedure describes situations in which a defendant may be served outside Ontario without leave of the court. Jurisdiction exercised on these grounds must meet the constitutional requirements of order and fairness. Many of the paragraphs in Rule 17.02 describe links between the matter and the forum that are easily accepted as real and substantial connections. For example, it is possible to serve a person outside Ontario in a proceeding in respect of a breach of contract that occurs in Ontario,[26] and in respect of a tort committed in Ontario.[27] In those situations, even if Ontario is not the defendant's home court and even if the defendant has not consented to the litigation of disputes in Ontario, Ontario may nevertheless be a suitable place to resolve those disputes because the cause of action arose in Ontario and, therefore, it is likely that much of the evidence and many of the witnesses will be readily available.

The two traditional "common law" grounds of judicial jurisdiction are also included in Rule 17.02. It is possible to serve a person outside Ontario who is resident in Ontario[28] and it is possible to serve a person outside Ontario in respect of a contract where the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract.[29] Accordingly, Rule 17.02 also provides for situations where Ontario is the defendant's home court and where the parties have consented to resolve their disputes in the Ontario courts. These are situations in which the defendant would usually be available for service in Ontario, or would be expected to consent to being served outside Ontario whether or not there was a real and substantial connection between the matter and the forum. The inclusion of these grounds in the Rule for service outside Ontario simply ensures that defendants who happen to be outside Ontario when the action is commenced may be served under the Rules even in cases where this would not ordinarily be necessary.

However, two paragraphs of Rule 17 seem to have little or nothing to do with the rationales identified above for permitting service outside the jurisdiction. They are paragraphs (h) and (o). It is no accident, then, that paragraph (h) of Rule 17.02 of the Ontario Rules of Civil Procedure became a focal point for a re-examination of jurisdiction and the real and substantial connection test. Rule 17.02(h) permits service outside Ontario in respect of "damage sustained in Ontario arising from tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed." Rule 17.02(o) permits service outside Ontario "against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario." These two bases for service seem unrelated to the traditional bases of

26 Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, para. (f)(iv).
27 *Ibid.* at para. (g).
28 *Ibid.* at para. (p).
29 *Ibid.* at para. (f)(iii).

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jurisdiction. They involve situations in which Ontario is not the home court, in which the parties have not consented to resolve their disputes in the Ontario courts, and in which the events giving rise to the cause of action have not occurred in Ontario.

It should be emphasized that paragraph (h) — the "damage sustained in" paragraph — is not concerned with harm that occurs in Ontario. These situations are covered in other paragraphs, such as (f) and (g), which provide for service in respect of breaches of contract occurring in Ontario and torts and other wrongs committed in Ontario. Moreover, as a result of the jurisprudence following the Supreme Court of Canada decision in *Moran v. Pyle National (Canada) Ltd.*[30] paragraph (g) encompasses situations in which the wrongful acts were committed outside Ontario, but the harm was suffered in Ontario. Accordingly, paragraph (h) is used only when plaintiffs, who have been injured elsewhere, come to Ontario, or return to Ontario, where they continue to suffer from their injuries. Similarly, paragraph (o) — the "necessary or proper party" paragraph — is not concerned with any of the connections described in the other paragraphs. It is used only in situations in which Ontario is the plaintiff's choice of forum and the defendant's home court, and where their dispute cannot properly be resolved without the participation of another person who would not otherwise be subject to the jurisdiction of the court.

Paragraphs (h) and (o) are important bases of jurisdiction, but they are founded on a different rationale from the three main bases of jurisdiction. The first basis — the consent of the defendant to resolve disputes in the Ontario courts — relies on an estoppel that prevents the defendant from objecting that the court does not have jurisdiction over the matter. Our courts rarely turn away parties who are both willing to resolve their disputes in the forum; and once they have agreed that the court should have jurisdiction over their dispute, they are bound to accept it.

The second basis — the capacity of the court to exercise general jurisdiction over claims against persons who can be served locally or who are local residents — can be traced to a time when the physical power of the sovereign over persons within its territory defined judicial jurisdiction both in criminal and civil matters. The ability to secure the defendants' participation by detaining them is no longer relevant to jurisdiction in civil proceedings. However, there remains a sense in which this basis reflects the residual regulatory responsibility of a sovereign over persons in its territory. In addition, it remains likely that it will be convenient to most defendants to resolve claims against them in their home court. For this reason, the presence or residence of the defendant in the territory of the forum continues to be a suitable basis of jurisdiction over defendants who are not prepared to make consensual arrangements for dispute resolution.

30 *Moran, supra*, note 16.

The third basis — real and substantial connection, or "assumed jurisdiction" — relies on connections between the forum and the events giving rise to the cause of action to serve as a suitable basis for jurisdiction when the defendant has not consented and when it is not the defendants' home court. In part, this basis of jurisdiction is also supported by the same regulatory rationale that supports the jurisdiction of the defendant's home court. When the parties have not both consented to a particular forum for litigation, it seems equally sensible to point to the regulation of *events* occurring in the forum as it does to point to the regulation of *persons* within the forum as a suitable basis for jurisdiction. In other words, just as it is reasonable for a court to exercise coercive jurisdiction over a defendant because the defendant is located in the territory of the forum, so too is it reasonable for a court to exercise coercive jurisdiction over a defendant because the defendant has caused harm in the territory of the forum, provided that it was forseeable. In addition to the regulatory rationale for jurisdiction based on a real and substantial connection, there is the logistical rationale based on the importance of facilitating the litigation process itself. Holding a trial in the place where the events giving rise to the cause of action have occurred can support the adjudicative process by ensuring access to the evidence and to the witnesses.

Rules 17.02(h) and 17.02(o) — the "damage sustained in" and "necessary and proper party" grounds for service outside the province — do not relate to any of these three bases for jurisdiction. They are not supported by the rationales favouring dispute resolution in a place amenable to the parties, dispute resolution as a means of regulating persons or events within the territory of the forum, or even dispute resolution in the place where it is likely to be best facilitated. It should not be surprising then, that the "damage sustained in" and the "necessary and proper party" bases of jurisdiction were not included in the list of connections that were considered to be presumptively "real and substantial" by the Uniform Law Conference of Canada in drafting the Uniform Court Jurisdiction and Proceedings Transfer Act.[31] In that model legislation, the exclusion of a ground from the list would not limit "the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [*enacting province or territory*] and the facts on which a proceeding is based".[32] However, exclusion from the list meant that these grounds were not considered to be presumptive real and substantial connections. Similarly, the "damage sustained in" basis was not included in the list of grounds for service outside the province in British Columbia or Newfoundland. While the jurisprudence suggests that these two grounds could serve as important bases of jurisdiction, they simply do not seem to fit the rationale for the "real and substantial connection" basis of jurisdiction.

31 See <www.law.alberta.ca/alri/ulc/acts/ejurisd.htm>.

32 Uniform Court Jurisdiction and Proceedings Transfer Act, 1994, s. 10.

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What is the rationale for exercising jurisdiction over a claim based on "damage sustained in" the forum, or for exercising jurisdiction over a person because that person is a "necessary or proper party" to a proceeding over which the court has jurisdiction? The rationale for exercising jurisdiction over damage sustained in the jurisdiction is based on an interest in promoting access to justice. Where a plaintiff is unable to travel to another forum to pursue a claim against a defendant, but the defendant is able to travel to defend the claim, it may be unfair to deprive the plaintiff of access to justice by refusing to exercise jurisdiction over the matter. The rationale for exercising jurisdiction over a person who is a necessary or proper party to a proceeding over which the court has jurisdiction is based on an interest in avoiding a multiplicity of actions with potentially inconsistent results. Indeed, taken in reverse order, it would seem that these two grounds for exercising jurisdiction could well be described as based on the principles of "order" (the avoidance of multiplicity) and "fairness" (access to justice). Accordingly, even though it seems that these two grounds cannot easily be characterized as examples of "real and substantial connections" to the jurisdiction, they seem to serve an important role in making jurisdictional determinations that conform to the principles of order and fairness.

V. EXPANDING OR SUPPLEMENTING THE REAL AND SUBSTANTIAL CONNECTION TEXT?

Does this mean that the real and substantial connection test may not be a comprehensive basis after consent and presence for making jurisdictional determinations in accordance with the principles of order and fairness? Or does this mean that the real and substantial connection test properly comprises the "jurisdiction *simpliciter*" part of the jurisdictional determination, and considerations of access to justice and the avoidance of multiplicity properly comprise the *forum non conveniens* part of the jurisdictional determination? Both views are worth considering.

There is support for the second view in English and Australian jurisprudence, where the fairness of permitting a person to sue locally for an injury suffered elsewhere has been considered to be part of the discretionary determination of whether the court was a convenient forum. In England, where the court is persuaded that there is a clearly appropriate forum elsewhere, it may nevertheless exercise jurisdiction where it would be unjust to deprive the plaintiff of a legitimate personal or juridical advantage enjoyed in the forum.[33] In one recent judgment, the House of Lords invoked in support of its decision to exercise jurisdiction the provision relating to "denial of justice" of the European Convention on Human Rights.[34] In Australia, the High Court recently declined to find that it was a clearly inappropriate forum in a claim against a foreign auto manufacturer for an accident that had occurred overseas where the defendants had failed to establish that a trial in the forum would be oppressive or vexatious in the relevant sense.[35]

33 *Spiliada Maritime Corp. v. Cansulex Ltd.* (1986), [1987] A.C. 460 (U.K. H.L.).

The problem with formulating the analysis in this way is that the determination of jurisdiction *simpliciter* (whether the court *can* decide the case) and the determination of *forum non conveniens* (whether the court *should* decide the case) are generally understood to be separate and sequential. Accordingly, in a case where there is no real and substantial connection, it would seem that the court would be unable to consider whether an interest in access to justice would nevertheless warrant the exercise of jurisdiction. That is, where the court had determined that it *could not* hear the case, it would seem logical that it could not go on to decide that, nevertheless, it *should* hear the case. Moreover, in Canada, where jurisdictional determinations are now based on constitutional imperatives,[36] the lack of a real and substantial connection could seem to render the exercise of discretion absolutely *ultra vires.*

However, to the extent that access to justice is an integral feature of the constitutional imperatives of the principles of order and fairness, it would be wrong to permit such a bi-furcation of the jurisdictional determination to pre-empt considerations of fairness. In *Oakley v. Barry* the Nova Scotia Court of Appeal held that:

> While this issue [*i.e.,* the concept of fairness in determining jurisdiction], as well as the issue of juridical advantage, are matters that are usually considered on a *forum non conveniens* issue, it is appropriate and relevant to consider them in this case involving jurisdiction *simpliciter*.[37]

Clearly, a consideration of fairness could not be pre-empted in a jurisdictional determination that proceeds in accordance with the constitutional requirements of order and fairness. If the interposition of the real and substantial connection test could pre-empt the consideration of fairness because the test

34 *Lubbe v. Cape Plc*, [2000] 2 Lloyd's Rep. 383 (U.K. H.L.). Article 6 of the European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221, provides in part that: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

35 *Regie National des Usines Renault SA v. Zhang*, [2002] HCA 10 (Australia H.C.).

36 In *Hunt v. T & N plc, supra*, note 2 at 324; the Supreme Court clarified that "the constitutional considerations raised [in *Morguard*] are just that. They are constitutional imperatives ...".

37 *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S. C.A.) at 699, leave to appeal refused (1998), 233 N.R. 397 (note) (S.C.C.). See also *O'Brien v. Canada (Attorney General)* (2002), 210 D.L.R. (4th) 668 (N.S. C.A.), leave to appeal refused (2002), 2002 CarswellNS 433, 2002 CarswellNS 434 (S.C.C.).

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did not encompass considerations of fairness, then the test simply cannot be comprehensive of the grounds of jurisdiction prescribed by the principles of order and fairness.

Returning to the first view (that there is more to the jurisdictional determination than consent, presence, and real and substantial connection), while Canadian courts have interpreted the real and substantial connection test in a flexible manner, it may be time to clarify the purpose that the real and substantial connection test can serve and to recognize that the considerations of order and fairness occasionally require the courts to go beyond it in order to promote access to justice and to avoid a multiplicity of proceedings. This view is similar to that taken in some civil law jurisdictions, notably in Quebec and Switzerland, where, in addition to the various provisions for jurisdiction, there is a special provision permitting the court to exercise jurisdiction as a forum of necessity, or as a forum of last resort. This provision is found in article 3 of the Swiss Private International Law,[38] and in article 3136 of the Quebec Civil Code, which states:

> Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

In a similar fashion, the concern to avoid a multiplicity of proceedings prompted the Court of Appeal in *McNichol Estate v. Woldnik*[39] to resist the apparent strictures of the real and substantial connection test where they might prevent the joinder of a foreign party and where the Court regarded this as necessary to meet the requirements of order and fairness. In regards to *Morguard* and *Hunt*, the Court observed that:

> ... [segregating claims and testing them in isolation] would be a step backwards, towards a focus on territoriality and away from the recognition of the increasingly complex and interdependent nature of the modern world community which lies at the heart of La Forest J.'s reasoning.[40]

The Court went on to say that:

> ... courts must be guided by these requirements of order and fairness. If it serves these requirements to try the foreign claim together with the claims that are clearly rooted in Ontario, then the foreign claim meets the "real and substantial connection" test.[41]

While the Court chose to resolve the dilemma by interpreting the real and substantial connection test broadly, it is suggested that it is better not to strain logic by doing so, but instead to recognize that considerations of access to justice and the avoidance of multiplicity may occasionally warrant the exercise of jurisdiction in order to meet the requirements of the principle of order and fairness even where there is no real and substantial connection.

VI. THE *MUSCUTT* FACTORS RECONSIDERED

The Court of Appeal set out a jurisdictional analysis in *Muscutt* based on eight factors, but it is now possible to assess these factors in terms of the four issues they raise:

a) connections with the claim and with the defendant;
b) fairness;
c) multiplicity; and
d) comity.

1. Connections with the Claim and the Defendant

These issues were considered in the first two factors: "the connection between the forum and the plaintiff's claim," and "the connection between the forum and the defendant". As the Court had explained in response to the defendants' submission that the real and substantial connection test required a connection between the forum and the defendant, a broader approach was warranted. In this broader approach, either a real and substantial connection between the forum and the defendant or between the forum and the subject matter of the action would be considered in determining jurisdiction. The plaintiffs had argued that:

> ... [under this interpretation of the test] "the connection between the forum and the subject matter of the action and the connection between the forum and the damages suffered by the plaintiff are equally relevant in determining whether there is a real and substantial connection."[42]

These connections reflect the established grounds of jurisdiction based on consent, presence/residence and real and substantial connection to the subject matter of the action. However, with respect, these connections were not present

38 Article 3 provides "Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes."

39 *McNichol Estate v. Woldnik*, *supra*, note 21.

40 *Ibid.* at 64.

41 *Ibid.* at 64-65.

42 *Muscutt, supra*, note 1 at 597.

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in the *Muscutt* cases. As has been explained, if these connections had been present in the *Muscutt* cases, the defendants would have been served on some basis other than the "damage sustained in" provision for service outside the jurisdiction.

The Court held that the location of the plaintiffs' residence and the location where the plaintiff receives medical attention or continues to suffer from the injury were significant connections. However, a real and substantial connection to the plaintiff's claim has usually been regarded as one that is relevant to the determination of liability and not merely to the determination of damages. These connections would be relevant to a determination of liability only if they happened to be a feature of the terms of the relationship between the parties that affected the duty of care or the standard of care. This would be rare. Accordingly, while the Court seemed anxious to find a real and substantial connection so as to support the exercise of jurisdiction in the *Muscutt* cases based on that test, this interpretation of the "connection to the plaintiff's claim" appeared to distort the useful purpose that is generally served by this factor in other kinds of cases.

It is unsurprising that the Court found no relevant connection between the forum and the defendants who objected to the exercise of jurisdiction over them. Again, if such a connection had existed, it would have warranted service on one of the other less controversial bases for service outside the province.

2. Fairness

This issue was considered in the third and fourth factors: "unfairness to the defendant in assuming jurisdiction" and "unfairness to the plaintiff in not assuming jurisdiction". In the most compelling cases, this is a question of access to justice for the plaintiff or the defendant or both. As mentioned earlier, this is the heart of the jurisdictional analysis in these kinds of cases. However, in the *Muscutt* decisions, notwithstanding the sophisticated and nuanced assessment of the factors relating to fairness, the analysis appeared to reflect the personal subjection approach to jurisdiction, which had been rejected earlier in the judgment in favour of a broader approach that included concerns for the administration of justice. Under a broader approach, it is suggested that the relevant questions relating to fairness would be: (1) If the court exercises jurisdiction, would one or more of the defendants be deprived of the opportunity to present a defence, particularly where this opportunity would exist for them in another forum?; and (2) If the court declines to exercise jurisdiction, would the plaintiffs be deprived of the opportunity to make the claim? Clearly, there would be occasions in which the answer to both of these questions would be yes, at least in respect of some defendants. On those occasions, the court would have to undertake a sensitive analysis of the relative extent of the prejudice faced by the parties.

This is not to say that the concern for access to justice was overlooked by the Court. On the contrary, it appeared to operate implicitly in the reasoning in *Muscutt*, in which it was noted that:

> The burden of defending the suit will fall on the defendants' insurer and not on the defendants themselves.
>
> . . .
>
> [U]nlike the defendant, the plaintiff does not have the benefit of an insurer to cover the cost of litigation.[43]

Under these circumstances, it seemed clear that considerations of fairness favoured exercising jurisdiction despite the lack of a real and substantial connection between the forum and the matter. In cases like *Leufkens*, *Lemmex* and *Gajraj*, the lack of insurance coverage to assist foreign defendants who were individuals and small businesses would also tend to give rise to concerns about access to justice. The Court's concern for fairness was evident in observations such as that of Aitken J. (granting leave to appeal to the Divisional Court) in *Lemmex,* who asked rhetorically: "Is it fair to expect Bernard, a local taxi driver in Grenada, to come to Ontario to defend this action?"[44] Similarly, in *Leufkens,* the Court relied on an example mentioned in oral argument when it observed that "it would be harsh to require an Algonquin Park canoe rental operator to litigate the claim of an injured Japanese tourist in Tokyo."[45] Nevertheless, in these cases it was relatively easy to respond to the concerns relating to access to justice raised by the circumstances of the foreign defendants because declining to exercise jurisdiction over them would not prevent the plaintiffs from seeking compensation from other defendants who were amenable to claims brought in Ontario.

However, it is hard to understand how such a concern for fairness to the defendant would support the result in *Sinclair.* In *Sinclair,* it would not be expected that a company that owns a chain of restaurants would be deprived of the opportunity to present a defence by having to defend in Toronto rather than Buffalo. This is not to suggest, however, that the result was necessarily wrong in *Sinclair.* Perhaps the result in *Sinclair* did not seem wrong because it would be unreasonable to expect that a Toronto resident, who was required to pursue a claim a two-hour drive away from Toronto in Buffalo, would be deprived of the opportunity to make the claim. This is particularly true when the claim would be made in a legal system that was as accessible to Canadian plaintiffs

43 *Muscutt, supra*, note 1 at 606-607.

44 *Lemmex, supra*, note 1 at 639.

45 *Leufkens, supra*, note 1 at 625. The Court then added: "Although negligent operators should certainly be held to account for their negligence, if they confine their activities to Ontario, they are entitled to expect that claims will be litigated in the courts of this province."

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as is the American legal system. Perhaps, then, it is better to say that in *Sinclair* any concerns for fairness to the plaintiff did not rise to the level of concerns of access to justice. As a result, in none of the five cases decided by the Court of Appeal did the Court face the dilemma that would be posed by genuine access to justice concerns affecting both the plaintiff and the defendant.

It is of concern, though, that there was a tendency that considerations of fairness, tended to become confused with questions of comity. For example, in *Sinclair* and *Gajraj*, the ability of the defendants in each case to travel from the alternative forum of New York was measured against the considerations of comity raised by requiring foreigners "from all corners of the earth"[46] to defend in Ontario courts. If fairness was a question of comity, the burden of defending in a foreign country would be the same regardless of the extent of the logistical challenges involved. However, when fairness is posed as a question of access to justice and of the ability of either a plaintiff or a defendant to litigate in a distant forum, there is a marked difference between requiring an Algonquin Park canoe rental operator to litigate the claim of an injured Japanese tourist in Tokyo and requiring an American restaurant chain to defend a claim in Toronto rather than Buffalo. Size and distance do matter.

A similar confusion of fairness with comity seemed evident in the observations relating to choice of law. The Court commented with apparent approval in *Sinclair* that:

> The motions court judge also held that issues of convenience supported New York as the convenient forum. For instance, the parties had recognized that New York law would govern the action.[47]

Like the need to travel to litigate, the need to consider the application of foreign law does not inevitably militate against the exercise of jurisdiction. In view of the requirement of applying the *lex loci* that was established by the Supreme Court of Canada in *Tolofson v. Jensen*,[48] every case in which jurisdiction is established on the basis of Rule 17.02(h) will potentially involve the application of some other law. Whether foreign law would be invoked, however, would be a function of party prosecution, and it would be subject to the particular circumstances of each case in much the same fashion as would be the question of access to evidence and witnesses. In some cases, there would not be enough

46 Admittedly, this phrase was used to describe the potential origins of restaurant clients who might sue in their home courts. Nevertheless, it was used to set the standard for fairness in these determinations: *Sinclair, supra,* note 1 at 650.

47 *Sinclair, supra*, note 1 at 646. This comment appears to have been addressed by the motions court judge to the question of appropriate forum, but since that was not at issue in the appeal, the comment must have been regarded by the Court of Appeal as relevant to jurisdiction.

48 *Tolofson v. Jensen*, (*sub nom. Lucas (Litigation Guardian of) v. Gagnon*) [1994] 3 S.C.R. 1022.

of a difference between the local law and the law of the place where the injury occurred to warrant the introduction of the other law. In other cases, the relevant difference in the law would be sufficiently plain that the expense and inconvenience of pleading and proving it would be relatively small. It is true that there would be some cases in which the application of another law would be necessary and sufficiently cumbersome to warrant declining jurisdiction. However, it is equally true that in a case such as *Muscutt,* where the law of Alberta would appear likely to apply to the claim, this factor was thought by the Court of Appeal to be so insignificant that it did not even warrant consideration. In sum, in considering fairness to the defendant courts should not presume that it is simply unfair to require foreigners who have not subjected themselves to the jurisdiction to defend here. The analysis of fairness to the defendant should be based on the ability of the defendant in all the circumstances to present a defence in the forum.

3. Multiplicity

This issue was considered in the fifth factor: "the involvement of other parties to the suit." In all but *Sinclair*, claims were made against one or more defendants who were subject to the court's jurisdiction based on consent or local service, and one or more defendants who were served outside Ontario on the basis of Rule 17.02(h).[49] Accordingly, a determination that the court should decline jurisdiction had the potential to result in a multiplicity of proceedings in each of these cases. This did not happen in *Muscutt* because the Court did not decline jurisdiction. In *Leufkens, Lemmex* and *Gajraj*, the decision not to exercise jurisdiction over the individuals and small businesses that challenged jurisdiction did not deprive the plaintiffs of the ability of make claims against other defendants of substance in the forum.

In *Leufkens* and *Lemmex*, the Court distinguished the decision in *McNichol Estate v. Woldnik*,[50] in which a multiplicity was avoided by assuming jurisdiction over a defendant who would not otherwise have been subject to the court's jurisdiction. As the Court explained:

> There, the action centred on the alleged negligence of the Ontario-based defendant and the foreign defendant was a secondary albeit necessary party. Here, the action centres on the alleged negligence of the foreign defendants and the Ontario defendants are secondary.[51]

While the result in *Leufkens* and *Lemmex* seems sensible, the application of the rationale requires some explanation. Both cases seemed to involve pro-

49 The *Sinclair* case involved only the Tennessee-based restaurant chain.

50 *McNichol Estate v. Woldnik*, *supra*, note 21.

51 *Leufkens, supra*, note 1 at 94.

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motions of the excursions by Canadian and American package holiday companies who were subject to the court's jurisdiction. At the very least there seemed to be no disclaimers made by the package holiday companies concerning the excursions. To the extent that the reasonable expectations of the parties are relevant, as they were said to be for much of the assessment of the other factors, it hardly accords with reasonable expectations that the typically risk-aversive package holiday client would happily get into "an old, dilapidated-looking blue Nissan minivan driven by" a local taxi-driver,[52] or would cheerfully allow a guide "to modify [a] safety harness to permit a 'quick descent'"[53] when rappelling fifty feet to the ground from a platform — but for the reassurance provided by the package holiday context.

It may not be within the reasonable expectations of travellers that either the Grenadian taxi driver or the Costa Rican guide would appear in an Ontario court. Nor would it reasonably be expected that package holiday tourists would put their personal safety in the hands of such persons if this was determinative of recourse. Indeed, it could reasonably be expected that travellers who were more adventurous and independent than those who travel on package holidays would exercise better judgment and greater caution in such circumstances in order to avoid injury. Despite the fact that the decision to decline jurisdiction over the foreign defendants had the potential to leave the package holiday companies without the ability to claim over against the local tour operators — and risk inconsistent verdicts — it seemed more appropriate for the package holiday companies to bear this burden than to impose the burden on the plaintiffs to make claims against the package holiday companies in the foreign defendants' home courts. If the package holiday companies' independent assurances to the plaintiffs were the basis on which the plaintiffs relied in making their travel arrangements, then this would appear to be an important aspect of liability that was properly addressed in Ontario where it occurred. As a result, in the *Muscutt* claims, the concerns about multiplicity seemed to be more apparent than real because the plaintiffs were, in any event, able to pursue their claims against substantial local defendants, who may have had an independent obligation to compensate them and whose entitlement and ability to claim over against the foreign parties was not entirely clear.

4. Comity

This issue was considered in the sixth, seventh and eighth factors — the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; whether the case is interprovincial or international in nature; and comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere. Each of these factors involves stepping back from the immediate considerations evident in the facts of the instant cases to examine the issues in the context of systemic concerns and prevailing standards. Each of the factors has the potential to provide guidance in the broad formulation of the jurisdictional test, even if they are not, in themselves, factors to be considered in the assessment of the facts of the particular case.

As was noted earlier, considering whether the court would be willing to recognize the judgment of another court rendered on this basis is helpful in bringing the analysis of the fairness to the defendant into sharp relief. In this regard, the point is well taken in *Lemmex* that "it would seem harsh to require an Algonquin Park canoe rental operator to litigate the claim of an injured Japanese tourist in Tokyo."[54] Similarly apt was the observation by O'Leary J. of the Divisional Court in *Lemmex*, when he said:

> I do not see how it can be fair or just because a tourist pays $21 for a bus-tour in Grenada, that he can require the Grenadian tour operator and the bus driver to come to Ontario to defend themselves against a claim for damages based on an alleged tort committed by them in Grenada.[55]

In view of the size of the defendants' businesses and the nature of the transaction on which the claims are based in these cases, it would be disproportionate and therefore unreasonable to require them to travel thousands of miles to defend a claim brought in a foreign legal system.

However, despite the laudable desire to be even-handed in jurisdictional standards, it should be noted that recent decisions of the Court of Appeal suggest that the Ontario courts *would* be likely to enforce such a judgment, where jurisdiction was exercised by a foreign court on this basis. For example, in *Beals v. Saldanha*,[56] a mistake in conveyancing that occurred in the sale of a Florida lot owned by Ontario residents that was solicited in Ontario for $8,000 (U.S.), gave rise to a judgment in an undefended claim that was held to be enforceable by a majority of the Court of Appeal. These Ontario defendants were expected to travel a great distance to defend a small claim in respect of a transaction solicited in Ontario. While it seems sensible to aspire to jurisdictional standards that Canadians would feel comfortable in having applied to local defendants, it may take some time before these standards become settled in the jurisprudence relating to the enforcement of judgments.

Similarly useful in the jurisdictional analysis, though not a separate factor, are the prevailing standards elsewhere for *jurisdiction*, although arguably less useful are the prevailing standards for the *enforcement of judgments*. The pre-

52 *Lemmex, supra*, note 1 at 57.
53 *Leufkens, supra*, note 1 at 86.

54 *Leufkens, supra*, note 1 at 625.
55 *Lemmex, supra*, note 1 at 634-635.
56 *Beals v. Saldanha* (1998), 42 O.R. (3d) 127 (Gen. Div.), additional reasons (1999), 1999 CarswellOnt 19 (Gen. Div.), reversed (2001), 54 O.R. (3d) 641 (C.A.), leave to appeal allowed (2002), 2002 CarswellOnt 1649, 2002 CarswellOnt 1650 (S.C.C.).

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vailing standards for the *enforcement of judgments* are less useful because the challenges that might be faced by a successful plaintiff in enforcing a judgment in a foreign country are not easily assessed by an issuing court and they are not usually thought to be the concern of the court. Courts do not refrain from issuing large judgments in local matters merely because defendants may not be able to satisfy them. Nor do Canadian courts refrain from issuing judgments merely because they might not be enforceable in some other country. These are matters of concern for the parties. Further, while the Supreme Court of Canada held that jurisdictional standards for the exercise of jurisdiction and for the enforcement of judgments in Canada should be correlative, and while Canadian courts have since extended this principle to foreign judgments, this is not the prevailing international approach to jurisdiction and judgments. The prevailing approach provides for different standards to be applied to the exercise of jurisdiction and to the enforcement of judgments except where these standards are set in the context of a federal or regional system. All in all, the prevailing local and international standards for the enforcement of judgments are not particularly helpful in determining jurisdictional standards. This may simply be an indication that it is important to set appropriate jurisdictional standards in anticipation that appropriate standards for the enforcement of judgments will follow.

The prevailing international standards for the exercise of *jurisdiction,* however, are a useful reference point. It is important when considering them to take into account the combined effect of the analysis of both jurisdiction *simpliciter* and *forum non conveniens.* As noted above in the analysis of the "damage sustained in" cases, despite the observations of the Ontario Court of Appeal on this point, there appear to be several leading precedents that suggest that where the circumstances of a case give rise to a genuine concern for access to justice, the courts may in exceptional cases exercise jurisdiction as a forum of necessity even over foreign defendants in claims that have arisen elsewhere.[57]

Finally, the Court held that it was relevant whether the case was interprovincial or international. In light of the jurisprudence over the last decade, it seems that the distinction between interprovincial enforcement and international enforcement is not generally thought relevant.[58] It is hard to explain why this distinction would not be relevant for the enforcement of judgments, but would be relevant for the exercise of jurisdiction when these standards are supposed to be correlative. Nevertheless, it remains that in a sensitive analysis of fairness to the defendant in cases raising questions of access to justice, it seems more difficult to justify the exercise of jurisdiction over a defendant from a different legal system, than it is to justify the exercise of jurisdiction over a defendant from another part of the same legal system.

57 See Section V — Expanding or Supplementing the Real and Substantial Connection Test?
58 *United States v. Ivey* (1995), 26 O.R. (3d) 533 (Gen. Div.), affirmed (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal refused (1996), [1997] 2 S.C.R. x.

While considerations of comity such as these may not be factors in themselves that can be applied to individual cases, they are helpful in formulating the factors that can be applied.

The detailed assessment of the jurisdictional factors that are relevant to the "damage sustained in" cases that were undertaken by the Court of Appeal in the *Muscutt* cases has advanced the law significantly in this area. Based on this assessment of these developments, it is suggested that the jurisdictional analysis required by the constitutional principles of order and fairness can now be summarized as a sequential series of four questions.

1. Has the defendant consented to litigation of the dispute in this court?
2. If not, is this court the defendant's home court?
3. If not, is there a real and substantial connection between the subject matter of the litigation and this court?
4. If not, does the need to promote access to justice or the need to avoid a multiplicity of proceedings warrant the exercise of jurisdiction?

VII. THE CONSTITUTIONALITY OF RULE 17.02(h)

The jurisdictional analysis undertaken by the Court in the *Muscutt* cases is so significant that it is possible to overlook the fact that the decisions considered two other important questions that should also be addressed here. The first of these questions was the constitutionality of Rule 17.02(h). Before considering the jurisdictional issues raised by the various cases, the Court considered the threshold question of whether the rule of service, Rule 17.02(h), was *ultra vires* the province. The defendants had argued that the Rule was *ultra vires* because it asserted jurisdiction that exceeded the limits of the principles of order and fairness.

The Court rejected this proposition because it said that the rules of service are merely procedural means for ensuring that the defendant is notified so as to have an opportunity to participate in the proceeding. Instead, the Court adopted the view that the rules merely "provide a rough guide to the kinds of cases in which persons outside Ontario will be regarded as subject to the jurisdiction of the Ontario courts"[59] and they do not determine the issue of jurisdiction. The Court went on to identify various other provisions of Rule 17.02 that indicate that Rule 17 "was not intended as a complete description of the requirements for assumed jurisdiction."[60]

59 J. Walker, "Rule 17 — Service Outside Ontario" in *Holmested and Watson, Ontario Civil Procedure* (Carswell: Toronto, 2001).
60 *Muscutt, supra,* note 1 at 596.

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The view that judicial jurisdiction is not determined by the ambit of the rules of service is relatively new in the Canadian jurisprudence.[61] Indeed, this view is different from that held by the English courts despite the fact that the Canadian common law of jurisdiction is loosely based on English jurisprudence.[62] In 1994, the majority of the Court of Appeal for Ontario expressed this view with respect to the law relating to the granting of stays in *Frymer v. Brettschneider*:

> ... the Ontario law relating to *forum non conveniens* is not found in Rule 17.06, but in the jurisprudence which has, over the years, elaborated on the rationale for the doctrine and the principles which should govern its application.[63]

While the Court in the *Frymer* decision, as in *Muscutt*, cited compelling evidence in the operation of the rule that it was not intended to provide for the scope of judicial jurisdiction, this did not entirely answer the question as it arose with respect to the *exercise of jurisdiction* when service was effected on the basis of Rule 17.02(h).

The argument that jurisdiction exercised on the basis of Rule 17.02(h) is *ultra vires* relies on the fact that the Rule is promulgated as part of a regulation that is authorized by legislation, in this case, the *Courts of Justice Act*,[64] that is enacted pursuant to the authority of the province under s. 92¶14 of the *Constitution Act, 1867*.[65] Since s. 92¶14 is subject to the extraterritorial incompetence that affects all provincial legislation, it is argued that service made pursuant to a rule promulgated under legislation authorized by s. 92¶14 could not found jurisdiction to determine a matter other than one that had a "real and substantial connection" to the forum. If the ambit of "real and substantial connections" is properly limited to cases in which there is a connection between the forum and defendant, or between the forum and the subject matter of the claim, and if the "damage sustained in" cases do not have such connections to the forum, it would be *ultra vires* the province to pass legislation permitting service in the "damage sustained in" cases and the exercise jurisdiction over such claims.

The Court answered this challenge by finding that the rule was merely procedural and did not determine jurisdiction, and that jurisdiction would always need to be exercised in accordance with the principles of order and fairness. This is undoubtedly true. As the Supreme Court of Canada explained in *Hunt v. T & N plc*:

> The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard, the connections relied on under the traditional rules are a good place to start.* More than this was left to depend on the gradual accumulation of connections defined in accordance with the broad principles of order and fairness ....
>
> ...
>
> Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.[66] (emphasis added)

The challenge to the constitutionality of Rule 17.02(h) made in *Muscutt*, however, was intended to suggest not only that service could not be effected because the Rule was *ultra vires*, but also that judicial jurisdiction exercised in cases of "damage sustained in the province" was itself to be measured by the requirements of s. 92¶14 of the *Constitution Act, 1867*. Judicial jurisdiction was therefore subject to the same extraterritorial incompetence associated with that provision. In other words, the interpretation of the real and substantial connection test should follow the jurisprudence that has interpreted the "within the province" requirements of s. 92 of the *Constitution Act, 1867*.

This challenge would be particularly significant for the exercise of jurisdiction in cases in which service is founded on Rule 17.02(h), where the connection to the province is limited to the plaintiffs' continued suffering from their injuries while in the province. As discussed earlier, unless knowledge of the plaintiff's residence in the province had an effect on the duty of care or standard of care, it would be at odds with the prevailing views of connections to the forum that are relevant to jurisdiction to treat this as a real and substantial connection. This is particularly true in *Muscutt* and *Oakley*,[67] in which the courts determined that the jurisdictional requirements were met, because the plaintiffs

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61 See "Canada's Position on the Hague Judgments Convention", Third Trilateral Conference (October 2000), reprinted in C. Charmody ed., *Trilateral Perspectives on International Law* 3d ed. (2003, forthcoming); *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), leave to appeal refused (2000), 52 O.R. (3d) 20 (Div. Ct.), leave to appeal refused (2001), 276 N.R. 197 (note) (S.C.C.).

62 P. North and J.J. Fawcett, *Cheshire and North's Private International Law*, 13th ed. (1999) at 297-298.

63 *Frymer v. Brettschneider* (1994), 115 D.L.R. (4th) 744 (Ont. C.A.) at 753.

64 *Courts of Justice Act*, R.S.O. 1990, c. C-43.

65 Section 92¶14 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, provides that:

> 92. In each Province the Legislature may exclusively make Laws in relation to . . .
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

66 *Hunt v. T & N plc, supra,* note 2 at 328-329.

67 *Oakley v. Barry, supra,* note 37.

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established or re-established their residence in the province only *after* the cause of action arose.[68]

On the assumption that the exercise of jurisdiction in these cases meets with the principles of order and fairness, and it seems that it does, it may be suggested that the requisite real and substantial connection need not be confined to those between the forum and the defendant and between the forum and the subject matter of the action, but may also extend to the litigation itself. In cases of the sort in which service outside the province may be been based on Rule 17.02(o), this could provide a compelling reason for the exercise of jurisdiction over plaintiffs resident in other provinces whose claims had arisen in their province of residence. This reasoning supported the certification of a multi-province class action in *Harrington v. Dow Corning Corp.*[69] in which MacKenzie J. held that "[i]t is that common issue which establishes the real and substantial connection necessary for jurisdiction."[70] Alternatively, it may be suggested that the exercise of jurisdiction must conform to the constitutional requirements of the principles of order and fairness, but that these requirements are not exhaustively comprised of "connections" of the sort that would meet the real and substantial connection test.

Regardless of the explanation, it would appear that jurisdiction in these cases is being exercised on grounds other than the kinds of "real and substantial connections" (*i.e.,* connections to the defendant or to the subject matter of the litigation) that are readily associated with connections that would satisfy the requirements of s. 92¶14. As was noted earlier, jurisdiction exercised on the basis of a concern for access to justice does not rely upon rationales associated with the regulation of persons and events in the territory of the forum and these would seem to be the rationale for legislative jurisdiction. To the extent that the exercise of jurisdiction in cases in which service is based on Rule 17.02(h) substantially affected persons or events occurring elsewhere and its constitutionality was to be measured by the scope of s. 92¶14, it would seem to be impermissibly extraterritorial, and therefore *ultra vires.*

There is a reason, however, why the determination of judicial jurisdiction differs from the determination of legislative jurisdiction. Although s. 92¶14 of the *Constitution Act, 1867* provides for the exclusive authority of the provinces over the administration of justice and the rules of civil procedure, the exclusive authority provided for in s. 92 is *legislative* authority, not *judicial* authority. The judicial authority of the provincial superior courts is not founded in s. 92; nor is the scope of the courts' jurisdiction defined by laws made pursuant to s. 92. The judicial authority of the provincial superior courts is not created by the *Constitution Act, 1867* at all, but is merely continued by it in s. 129. This is clear from the Preamble to the *Constitution Act, 1867*, which explains the purpose of the Constitution — "not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared" — without making any reference to the Courts. It is also clear from s. 129 itself, which provides that:

> Except as otherwise provided by this Act ... all Courts of Civil and Criminal Jurisdiction, ... existing therein at the Union, shall continue ... as if the Union had not been made; subject nevertheless ... to [authorized and applicable legislation].

The existence of this distinct source of authority for judicial jurisdiction supports the view that the determination of judicial jurisdiction pursuant to the principles of order and fairness should not be tethered to concepts such with "pith and substance" and "incidental effects," which could never fully embrace the concerns with access to justice and the avoidance of multiplicity that have been so significant to Canadian courts. In cases such as those in which jurisdiction is exercised on the basis of Rule 17.02(h), there may be no "real and substantial connection" to the province warranting the exercise of jurisdiction in the way that legislation is warranted for the regulation of matters that are in "pith and substance" connected to the jurisdiction and have only incidental effects elsewhere. Nevertheless, in such cases, where jurisdiction is exercised in order to ensure access to justice or to prevent a multiplicity, it is supported by the principles of order and fairness.[71]

VIII. WITHER *FORUM NON CONVENIENS*?

In addition to the constitutional analysis undertaken by the Court in *Muscutt,* the Court addressed the relationship between the determinations of jurisdiction *simpliciter* and of *forum non conveniens.* Following the approach taken in English jurisprudence to these determinations, they have generally been thought to be separate and sequential. In part, this is because it is thought that in cases in which the court is exercising an "assumed jurisdiction," which is based on grounds granted by the legislature, there may be a need for the court to exercise discretion to ensure that it is not doing so inappropriately.

As was noted earlier, a concern arose with this approach in Canadian jurisprudence when it seemed possible to pre-empt the exercise of jurisdiction in cases where it would ensure access to justice by arguing that the lack of a

68 Although in *Oakley,* the Court found that the cause of action accrued after the plaintiff moved to Nova Scotia because it was then that it was discovered that her condition had been misdiagnosed in New Brunswick, where she had previously resided. This was not so in *Muscutt.*

69 *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.), affirmed (2000), 193 D.L.R. (4th) 67 (C.A.), leave to appeal refused (2001), 2001 CarswellBC 1873, 2001 CarswellBC 1874 (S.C.C.).

70 *Harrington v. Dow Corning Corp.* (1997), 29 B.C.L.R. (3d) 88 (S.C.) at 95.

71 See J. Walker, "The Constitution of Canada and the Conflict of Laws", (Oxford University, 2001). Available at <http://research.osgoode.yorku.ca/walker>.

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real and substantial connection placed the matter beyond the Court's jurisdiction under the *Constitution Act, 1867*. As a simple matter of logic, constitutional imperatives cannot be overridden by judicial discretion. The Nova Scotia Court of Appeal overcame this hurdle in *Oakley v. Barry* by deciding that:

> ... while this issue [*i.e.*, fairness], as well as the issue of juridical advantage, are matters that are usually considered on a *forum non conveniens* issue, it is appropriate and relevant to consider them in this case involving jurisdiction simpliciter.[72]

Treating fairness as part of the jurisdictional determination permitted courts to exercise jurisdiction where the principles of order and fairness warranted. However, this approach fit awkwardly with the view that jurisdiction *simpliciter* was a fixed and rigid limit to the cases in which the court could exercise jurisdiction that depended upon demonstrating a real and substantial connection between the cause of action or the parties and the forum, and that *forum non conveniens* was a discrete analysis in which there might be a discretionary narrowing of the ambit of cases in which the court would exercise jurisdiction. Cases like *Oakley* and *Muscutt* were cases in which the courts seemed to be exercising their discretion on grounds of fairness or equity to *enlarge* the ambit of jurisdiction beyond the fixed limits set by the real and substantial connection test.

As a result, it seemed that Canadian courts were beginning to blend the two kinds of analysis to create a single jurisdictional determination. This would not be an entirely new departure from the approach recommended by the Supreme Court of Canada. In *Hunt v. T & N, plc,* the Court observed that it did not need to:

> ... consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of forum non conveniens .... Whatever approach is used, the assumption of, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.[73]

Indeed, from the standpoint of litigants and practitioners, it hardly matters whether the court makes the jurisdictional determination based on whether it *can* hear the case or whether it *should* hear the case. Ultimately the real question is whether the court *will* hear the case.

In *Muscutt,* the Court described the distinction between the real and substantial connection test and the discretionary *forum non conveniens* doctrine in traditional terms as follows:

72 *Oakley v. Barry, supra,* note 37 at 699.
73 *Hunt v. T & N plc, supra,* note 2 at 326.

> While the real and substantial connection test is a legal rule, the *forum non conveniens* test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the *forum non conveniens* test is a discretionary test that focuses upon the particular facts of the parties and the case. The question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant.[74]

While this is the traditional approach, with respect in applying the *Muscutt* factors to each of the five cases, the Court did undertake a detailed fact-specific analysis to determine whether "the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant."[75] Further, the Court noted that Canadian courts had developed the following list of factors for determining the most appropriate forum for the action:

- the location of the majority of the parties
- the location of key witnesses and evidence
- contractual provisions that specify applicable law or accord jurisdiction
- the avoidance of a multiplicity of proceedings
- the applicable law and its weight in comparison to the factual questions to be decided
- geographical factors suggesting the natural forum
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court[76]

Again, with respect, while it is true that the Court did not consider each and every one of these factors in determining whether to exercise jurisdiction, the factors that it did consider did not seem to be materially different from these factors; and the factors were considered in the same flexible, fact-specific way that is typical of *forum non conveniens* analysis.

Clearly, there is a distinction between the determination of jurisdiction *simpliciter* and *forum non conveniens* in that the former is decided on its own terms and the latter is decided in relation to the suitability of an alternative forum. It is arguable, though, that the concerns of promoting access to justice and avoiding a multiplicity of proceedings address, if only indirectly, situations in which the jurisdictional question arises relatively. This is because if there is an alternative forum that is accessible to the plaintiff or the defendant, that will be relevant to determining whether the exercise of jurisdiction is necessary to

74 *Muscutt, supra,* note 1 at 593-594.
75 *Ibid.* at 594.
76 *Ibid.* at 593.

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ensure access to justice. Similarly, the existence of a more appropriate forum elsewhere may be relevant to determining whether exercising or declining jurisdiction is necessary to avoid a multiplicity of proceedings. Accordingly, it is suggested that the four-step analysis set out earlier could encompass the entire jurisdictional determination. However, should there be cases in which the existence of an alternative forum raises jurisdictional issues unrelated to access to justice or the avoidance of multiplicity, it is suggested that it is better to add this consideration as a fifth question to a jurisdictional analysis that nevertheless takes an integrated approach to jurisdiction *simpliciter* and *forum non conveniens* than it is to retain the traditional segregated approach.

1. Has the defendant consented to litigation of the dispute in this court?
2. If not, is this court the defendant's home court?
3. If not, is there a real and substantial connection between the subject matter of the litigation and this court?
4. If not, does the need to promote access to justice or the need to avoid a multiplicity of proceedings warrant the exercise of jurisdiction?
5. Is there a clearly more appropriate forum elsewhere?

The traditional segregated approach to jurisdiction *simpliciter* and *forum non conveniens* may be appropriate for courts such as the English courts that regard their jurisdiction as determinable through the combined effect of fixed legal limits imposed by statute and discretionary equitable assessments of particular cases, but it seems less appropriate for Canadian courts whose jurisdiction is founded on constitutional principles of order and fairness that reflect a more autonomous and integrated approach to judicial authority.

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