

LOST IN TRANSITION: ANSWERING THE QUESTIONS RAISED BY THE SUPREME COURT OF CANADA'S NEW APPROACH TO JURISDICTION

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The authors analyze the emerging jurisprudence on four questions raised by the new principles on the taking of jurisdiction emanating from the Supreme Court of Canada. Each question concerns the relationship between the requirement of a real and substantial connection, as developed in cases since Morguard, and the traditional bases for jurisdiction – the defendant's presence in the province, the defendant's submission to the court, and the province's rules for service outside its borders. Drawing on examples from Ontario and British Columbia, the authors identify considerable divergence in the case law, both at the appellate and first-instance levels, before recommending and justifying an answer to each question.

Les auteurs analysent la jurisprudence récente portant sur quatre questions soulevées par les nouveaux principes énoncés par la Cour suprême du Canada en matière d'exercice de compétence par un tribunal. Chacune des questions porte sur le rapport entre l'exigence d'un lien réel et substantiel avec l'action, tel que développé depuis l'arrêt Morguard, et les fondements traditionnels d'exercice de compétence - la présence du défendeur dans la province, la requête du défendeur à la cour, et les règles de la province concernant la signification à l'extérieur de ses frontières. Se fondant sur des exemples issus de l'Ontario et de la Colombie-Britannique, les auteurs identifient des divergences importantes dans la jurisprudence, tant en première instance qu'en appel, avant de recommander, tout en la justifiant, une réponse à chaque question.

Introduction

One of the key questions addressed by the conflict of laws is whether a court has jurisdiction over a dispute. In common law Canada, the focus is on the jurisdiction of the provincial superior courts. Prior to 1990, it was well established that such a court could take jurisdiction over a defendant on one of three bases: the defendant's presence in the province, the

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defendant's submission to the court, or the province's rules, set by regulation, for service of the defendant outside its borders. Rule 17.02 of the Ontario *Rules of Civil Procedure*¹ and rule 13(1) of the British Columbia *Supreme Court Rules*² are examples of the third of these bases, enumerating certain circumstances in which a defendant outside the province can be served without leave of the court.³

In 1990, the Supreme Court of Canada introduced a significant new approach to the taking of jurisdiction by a provincial superior court. In *Morguard Investments Ltd. v. De Savoye*, the court held that for the courts of one province to properly exercise jurisdiction over a defendant in another province, there had to be "a real and substantial connection" between the province and the dispute.⁴ In so holding, the court revolutionized the law in Canada with respect to the exercise of jurisdiction over extra-provincial defendants in civil proceedings.

Morguard left many questions unanswered.⁵ A decade after the decision, Garry Watson and Frank Au analyzed how provincial courts were handling two of those questions.⁶ The first was related to the strength of the connection: Was *the most* real and substantial connection required, or was *a* real and substantial connection enough? The second related to what the required connection was between: Was it only between the forum and the defendant, or was it between the forum and a wider range of aspects of the dispute? Those two questions seem to have been conclusively resolved, in the manner advocated by Watson and Au.⁷ A real and substantial connection is sufficient, and the connection is between the forum and the dispute as a whole.

Another open question was what would constitute a real and substantial connection. In *Morguard* the court did not offer much elaboration, but subsequent cases have provided considerable insight.⁸ In

¹ R.R.O. 1990, Reg. 194.

² B.C. Reg. 221/90.

³ A plaintiff can also ask the court for leave to serve a defendant outside the province if the case does not fit under one of the heads of these sections: see rule 17.03 of the Ontario *Rules of Civil Procedure* and rule 13(3) of the British Columbia *Supreme Court Rules*.

⁴ [1990] 3 S.C.R. 1077 at 1104 [*Morguard*].

⁵ See J. Blom, "Conflict of Laws – Enforcement of Extraprovincial Default Judgment – Real and Substantial Connection: *Morguard Investments Ltd. v. De Savoye*" (1991) 70 Can. Bar Rev. 733.

⁶ G. Watson and F. Au, "Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*" (2000) 23 Advocates' Q. 167.

⁷ For one of the more definitive judicial treatments of these two issues, see *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) [*Muscutt*].

⁸ See S. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stands After

Muscutt v. Courcelles, the Court of Appeal for Ontario set out an analytical framework for assessing whether a dispute had a real and substantial connection with the province.⁹ The framework weighs the following eight factors: the connection between the forum and the plaintiff's claim, the connection between the forum and the defendant, unfairness to the defendant in assuming jurisdiction, unfairness to the plaintiff in not assuming jurisdiction, the involvement of other parties to the proceedings, 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.¹⁰

The aim of this article is to analyze the emerging answers to four further questions raised by the new jurisdictional principles. First, must a real and substantial connection be established in cases where the defendant is served inside the province? Second, must a real and substantial connection be established in cases where the defendant submits to the court's jurisdiction? Third, must a real and substantial connection be established if the defendant is served not in another province but rather outside of Canada? Fourth, in cases where the defendant is outside the province, to what extent can the real and substantial connection requirement be satisfied by fitting the case within the province's established bases, set by regulation, for service abroad?

For each of these four questions, the analysis will start by considering what the Supreme Court of Canada has said on the issue. It will then examine how those statements have been interpreted and applied in subsequent provincial court decisions, focusing on those from British Columbia and Ontario.¹¹ Finally, the article will suggest an answer to each question.

Service in the Province

In *Morguard* the issue before the Supreme Court of Canada was the enforceability of an Alberta judgment in British Columbia. The case was not directly about the taking of jurisdiction. However, the court drew an important link between these two topics. La Forest J. stated that "the taking of jurisdiction by a court in one province and its recognition in another

Beals" (2004) 40 Can. Bus. L.J. 189 at 205-211.

⁹ *Supra* note 7.

¹⁰ *Ibid.* at paras. 75-110.

¹¹ These provinces offer a representative sample of the totality of the lower court decisions across Canada. Indeed, they tend to have more cases raising jurisdictional issues than the other common-law provinces. They also have had the benefit of provincial appellate guidance on some of the issues addressed in this article.

must be viewed as correlatives... recognition in other provinces should be dependent on the fact that the court giving judgment ‘properly’ or ‘appropriately’ exercised jurisdiction.”¹² The subsequent explanation in *Morguard* of what taking of jurisdiction was proper or appropriate, for purposes of obtaining recognition in another jurisdiction, has come to be seen as a leading statement defining the limits of provincial jurisdiction more generally.¹³

The court stated that there was “no difficulty” in finding that a court had appropriately exercised jurisdiction in a case based on the defendant’s presence in the province at the time the litigation was commenced.¹⁴ It then continued, in the context of cases where the defendant was not present in the province, to develop the real and substantial connection requirement for taking jurisdiction. This contextual separation is critical. There is no suggestion that the court was modifying the traditional test for jurisdiction based on the presence of the defendant. The court did not say anything that would support the argument that, in addition to the defendant’s presence, there must also be a real and substantial connection between the province and the dispute before the court can take jurisdiction.

Clear as this might have seemed, our highest court has subsequently made some ambiguous statements on this issue. In *Tolofson v. Jensen* the Supreme Court of Canada stated:

[C]ourts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may exercise jurisdiction only if it has a “real and substantial connection” (a term not yet fully defined) with the subject matter of the litigation.¹⁵

The court made this statement almost in passing, summarizing its recent

¹² *Supra* note 4 at 1103.

¹³ There is no doubt that the impact of *Morguard* reaches beyond the rules for recognition and enforcement of judgments and extends to the law relating to when a court is entitled to exercise jurisdiction over a party to a proceeding: see J. Walker, “Rule 17 – Service Outside Ontario” in G. Watson and C. Perkins, eds., *Holmested and Watson: Ontario Civil Procedure* (Toronto: Carswell, 2003) at 17-24. In fact, most of the decisions since *Morguard* that have fleshed out the meaning of a real and substantial connection have been related to the taking of jurisdiction as opposed to the enforcement of judgments. See Pitel, *supra* note 8 at 205.

¹⁴ *Supra* note 4 at 1103.

¹⁵ [1994] 3 S.C.R. 1022 at 1049 [*Tolofson*]. Highly similar is the statement from J.-G. Castel & J. Walker that “today in Canada the test for judicial jurisdiction in the conflict of laws is whether there is a real and substantial connection between the forum and the parties or the subject matter of the action.” J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 6th ed. (Markham: LexisNexis Canada Inc., 2005) at para. 11.1.

decisions on jurisdiction, in the context of analyzing the choice of law rule for tort claims. This is an unlikely context in which to change the law on this issue. Moreover, while the court did not expressly draw the distinction between service in Ontario and service outside Ontario, its references to “extraterritorial and transnational transactions” must provide some context for the subsequent sentence. Nonetheless, taken out of context, that sentence could be read as indicating that the real and substantial connection test must always be applied.¹⁶

More recently, in *Beals v. Saldanha*, another case about recognition and enforcement, Major J. for the majority stated:

A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties.¹⁷

It is very difficult to see how this is consistent with *Morguard*. Indeed, it is worded so as to suggest that the real and substantial connection test has replaced the traditional three bases for taking jurisdiction, so that it applies equally whether the defendant is served in or outside the province. Yet for all that it is still decidedly unclear.¹⁸ There is no indication in any of Major J.’s surrounding statements that he intended to make a significant change to the law on jurisdiction. In fact, in the next sentence he confirmed that submission to the court – one of the other traditional bases for jurisdiction – remains an independent basis for jurisdiction.

The vague nature of these statements by the majority in *Beals* contrasts with the clarity in LeBel J.’s dissent. In his view:

[T]he logic on which the *Morguard* test is founded suggests that it should supersede, rather than complement, the traditional common law bases of jurisdiction. In my view, it is not necessary to ask whether any of the traditional grounds are present and then go on to ask whether there is a real and substantial connection (as the majority reasons suggest, at para. 37). There should be just one question: is the “real and substantial connection” test made out?¹⁹

Two points can be made here. First, LeBel J. is firmly of the view that in all cases a real and substantial connection must be established for the court

¹⁶ The British Columbia Court of Appeal appears to do so in *Teja v. Rai* (2002), 209 D.L.R. (4th) 148 (B.C.C.A.) at paras. 18-19 [*Teja*].

¹⁷ [2003] 3 S.C.R. 416 at para. 37 [*Beals*].

¹⁸ Pitel, *supra* note 8 at 202.

¹⁹ *Supra* note 17 at para. 207.

to have jurisdiction. Second, that this position is expressed in dissent, expressly criticising the majority's position, lends support to the argument that the majority did not intend to change the traditional approach. Otherwise, there would have been common ground on this issue between Major J. and LeBel J. In the end, the Supreme Court of Canada's position on this issue cannot be clearly stated. *Morguard* seems clear enough, but the language in *Tolofson* and *Beals* blurs our vision.

Turning to the decisions at the provincial level, there is significant tension between the approaches that have emerged in Ontario and British Columbia. In *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, the plaintiffs brought a statutory oppression action in Ontario against six defendants.²⁰ Five of the defendants either had offices in Ontario or carried on business in Ontario. In challenging the court's jurisdiction, they argued that "irrespective of whether the defendant is present in the jurisdiction, as a matter of constitutional law, there must be a real and substantial connection between the subject matter of the litigation and the province."²¹ The Court of Appeal for Ontario disagreed. It held that there was no constitutional obstacle to the court taking jurisdiction based on the defendant's presence in the province: nothing more was required.²² The court stated that the real and substantial connection test was concerned with "assumed jurisdiction", not "presence-based jurisdiction"; it was "limited to cases where the courts seek to assert jurisdiction over out-of-province defendants."²³ This is a strong endorsement of the view that *Morguard* did not change the test for jurisdiction based on presence.

However, the situation is less clear regarding the court's treatment of the sixth defendant, Israel Asper. The court noted that he was a resident of Manitoba. There was some debate on the facts, but the court was prepared to assume that he had been properly served in Ontario while on a visit there. The court stated: "Whether served in or out of Ontario, since he is an extra-provincial defendant, Ontario courts only have jurisdiction over him if the real and substantial connection test is met."²⁴ This statement is remarkable. It has long been accepted that by "presence", the courts mean not only a long-term connection such as residence or carrying on business but also a short-term connection such as visiting the province for a brief period or even just passing through in transit. Historically any presence,

²⁰ (2003), 63 O.R. (3d) 431 (C.A.) [*Incorporated Broadcasters*].

²¹ *Ibid.* at para. 32.

²² *Ibid.* at paras. 33, 35.

²³ *Ibid.* at paras. 29-30.

²⁴ *Ibid.* at para. 37.

however fleeting, grounded jurisdiction.²⁵ Nothing in the court's analysis of the other five defendants negates this, but of course they each had more than temporary presence. In analyzing Asper's position the court seems to adopt quite a different meaning of presence, such that temporary presence is not in itself sufficient for jurisdiction. By requiring that a real and substantial connection be shown in such cases, the court equated them with cases in which the defendant is served outside the province. In other words, the court held that in at least some cases of service inside Ontario – those where the defendant lacks a more long-term presence – there is indeed a requirement that a real and substantial connection be shown.

The courts in British Columbia appear to have taken a different view, although the key decision – that of the British Columbia Court of Appeal in *Teja v. Rai* – is not easy to follow.²⁶ On the one hand, the court stated: “At no point in *Morguard*... did [La Forest J.] resile from the view that the presence of the defendant in the territory of a court could itself ground jurisdiction in that court.”²⁷ It also stated that the real and substantial connection test was “developed for non-traditional situations” and does not override the traditional tests.²⁸ This seems entirely consistent with preserving the traditional approach. Yet the court went on to hold that “the new test can be seen as including the traditional elements as relevant connecting factors, including the presence of the defendant within the territory of the court.”²⁹ This is a very different way of phrasing the test, making it appear that the older approach has been subsumed by a real and substantial connection test which must be satisfied in all cases.

The British Columbia Court of Appeal has affirmed that *Teja* stands for the proposition that “the real and substantial connection test can be seen as including the traditional elements as relevant connecting factors, but the traditional tests are no longer determinative of jurisdiction *simpliciter*.”³⁰ On this approach it would be open for defendants served inside a province, whether or not they have a long-term presence there, to argue that the court lacks jurisdiction due to the lack of a real and substantial connection between the province and the dispute. While this is consistent with *Incorporated Broadcasters* in so far as temporary presence is concerned, it is directly contrary on the issue of defendants

²⁵ See Castel and Walker, *supra* note 15 at 11.8. The best-known English case on temporary presence is *Maharanee of Baroda v. Wildenstein*, [1972] 2 All E.R. 689 (C.A.).

²⁶ *Supra* note 16.

²⁷ *Ibid.* at para. 22.

²⁸ *Ibid.* at para. 23.

²⁹ *Ibid.* at para. 24.

³⁰ *Marren v. Echo Bay Mines Ltd.* (2003), 226 D.L.R. (4th) 622 (B.C.C.A.) at para. 13 [*Marren*].

with a more long-term presence in the jurisdiction.

In general, lower courts in Ontario have followed *Incorporated Broadcasters* and have not required independent examination of the real and substantial connection requirement when jurisdiction is based on presence.³¹ However, there are exceptions. In *Newton v. Larco Hospitality Management Inc.*, the court concluded that the defendant had a presence in Ontario and that, following *Incorporated Broadcasters*, this presence made it unnecessary to consider the real and substantial connection test.³² However, Brennan J. thought that this reasoning had to be reconsidered in light of *Beals*. He quoted the passage by Major J. set out above and held that the defendant's "presence in Ontario does not alone confer jurisdiction but 'serves to bolster the real and substantial connection to the action or parties'."³³ The connection had to be established even though the defendant was present in Ontario. On appeal, in very brief reasons, the Court of Appeal for Ontario simply noted that a real and substantial connection had been shown and so the court had jurisdiction. The approach in *Newton* is much more like LeBel J.'s dissenting approach in *Beals*.

In British Columbia, the broad phrasing in *Teja* has been cited by lower courts, but typically in the context of service *ex juris*. In *Western Union Insurance v. Re-Con Building Products Inc.*, however, the defendant, a British Columbia corporation, moved both to challenge the court's jurisdiction and for a stay of proceedings.³⁴ Relying on *Morguard*, the court stated: "The test for jurisdiction simpliciter is whether there is a real and substantial connection between the Court and either the defendant or the subject matter of the litigation. Where the defendant, as here, is a B.C. company jurisdiction simpliciter is established."³⁵ Like *Newton*, this case is a striking example of a court using the real and substantial connection test even though the defendant was present in the province.

In light of this diverging jurisprudence, how should courts proceed? As a starting point, the historic roots of presence-based jurisdiction

³¹ See *Maddaloni v. ING Groupe Commerce* (2003), 43 C.P.C. (5th) 377 (Ont. S.C.J.) at para. 11, aff'd (2004), 3 C.P.C. (6th) 22 (Ont. C.A.); *Danks v. Ioli Management Consulting* (2003), 43 C.P.C. (5th) 242 (Ont. Master) at para. 8, aff'd (2005), 47 C.C.E.L. (3d) 157 [*Danks*].

³² (2004), 70 O.R. (3d) 427 (S.C.J.), aff'd (2005), 75 O.R. (3d) 42 (C.A.) [*Newton*].

³³ *Ibid.*, S.C.J. at para. 11.

³⁴ (2000), 36 C.C.L.I. (3d) 242 (B.C.S.C.), aff'd (2001), 95 B.C.L.R. (3d) 253 (C.A.) [*Western Union Insurance*].

³⁵ *Ibid.* at para. 28.

cannot be over-emphasized. As a matter of precedent, common law courts have taken jurisdiction based on presence for hundreds of years.³⁶ In this context, the onus should be on any judge proposing to abandon presence as an independently sufficient basis for jurisdiction to justify doing so in highly persuasive terms. It cannot be firmly stated that the Supreme Court of Canada requires the real and substantial connection test to be applied in cases of service in the province, or has provided any justification for such a major change. Absent clear direction from the Supreme Court of Canada, as a matter of precedent provincial courts should continue to treat the presence of the defendant as a separate and traditional basis for taking jurisdiction.

This answer is supported by more than precedent. Four arguments can be advanced to support jurisdiction based on presence.³⁷ First, it flows from the nature of territorial sovereignty. Those present within a jurisdiction owe allegiance to the laws and institutions of that country. For that allegiance to be properly enforced, those present must be subject to being sued in the country's courts. Second, it accords with basic notions of fairness. The defendant's presence is a meaningful connection between the defendant and the jurisdiction. The defendant has deliberately chosen to be in the jurisdiction, and it is not out of line with reasonable expectations for the court to take jurisdiction based on presence. Presence is a reliable indicator of the defendant's ability to defend against claims in that place. Third, it promotes certainty. Under our law there should be established circumstances in which the parties to litigation know that jurisdiction is not in issue. If every case depends on the demonstration of a real and substantial connection, then jurisdiction is open for debate in every case. Fourth, jurisdiction based on presence is subject to the court's discretion to stay proceedings in favour of a more convenient forum. We therefore have a procedural mechanism to guard against the limited number of problems that rigid assertion of presence-based jurisdiction might cause.

Presence-based jurisdiction does have one potential weakness: its treatment of temporary presence. We will address this issue, but it is first critical to make the point that concerns about jurisdiction based on temporary presence are in no way sufficient to justify abandoning presence-based jurisdiction in its entirety. If there is to be reform at all in

³⁶ See e.g. *Mostyn v. Fabrigas* (1774), 98 E.R. 1021 (K.B.); *Cartwright v. Pettus* (1675), 22 E.R. 916 (Ch.); *Potter v. Allin* (1793), 2 Root 63 (Conn.).

³⁷ For an extended discussion of arguments supporting presence-based jurisdiction see the decision of the United States Supreme Court in *Burnham v. Superior Court of California*, 495 U.S. 604 [*Burnham*].

this area, it should be focused on the discrete question of temporary presence.³⁸

There are two central lines of argument for why presence-based jurisdiction should continue to include temporary presence. First, the arguments which support presence in general, outlined above, are applicable to temporary presence. They may apply to a lesser degree, but they still apply. Those only briefly in a province still owe some allegiance to it, still are there by choice, and still have the ability to argue *forum non conveniens*. They can predict, under our longstanding rules, that their temporary presence exposes them to being sued in the province, and can plan their conduct accordingly. The fact that they have already traveled to the province at least once suggests that they could do so again as a defendant.³⁹

Second, distinguishing temporary presence from other types of presence will not be straightforward. On the facts of *Incorporated Broadcasters* it is easy enough: brief visits by a foreigner are readily labelled temporary. But what if Asper came to Ontario at least once a month, on business or pleasure? What if he stayed for a week or more at a time? What if he sometimes stayed for more than a month? The dividing line between what is temporary and what is not is not easily drawn. Under the traditional approach, any degree of presence is sufficient for jurisdiction. Under a new approach, like that in *Incorporated Broadcasters*, debate will be possible in many cases about whether the defendant's degree of presence is sufficient. This added complexity would be an unwelcome development.

In light of all these reasons, it is at minimum very difficult to see the merit in allowing a defendant with a firm presence in the province – such as residence or corporate operations – to assert that the court lacks jurisdiction. Yet that is the result under *Teja*, *Newton* and *Western Union Insurance*. The approach in those cases should not be followed. Presence should remain an independent basis for jurisdiction. Further, as argued, it should continue to cover all forms of presence, including temporary presence.

Submission by the Defendant

Whether a real and substantial connection must be established in cases where the defendant submits to the court's jurisdiction raises many of the

³⁸ This was the approach adopted in *Incorporated Broadcasters*, *supra* note 20.

³⁹ See *Burnham*, *supra* note 37 at 638-39.

same considerations as the previous issue. Traditional conflict of laws principles have long held that a defendant's voluntary submission, or attornment, to the court's jurisdiction is an appropriate basis upon which the court may take jurisdiction *simpliciter*. Defendants who attorn to a court's jurisdiction by defending the action on the merits vest jurisdiction over themselves in the court, even if the court would not otherwise have had jurisdiction without this implicit consent.⁴⁰

The leading statements from the Supreme Court of Canada are largely the same for both presence and submission. In *Morguard* the court was equally clear that there was "no difficulty" in finding that a court had appropriately exercised jurisdiction in a case where the defendant had "submitted to its judgment whether by agreement or attornment", without reference to the real and substantial connection test.⁴¹ The court's subsequent statement in *Tolofson*, explained above, serves to confuse the issue regarding submission as it does the issue of presence. In *Beals*, the court recognized attornment as an appropriate basis upon which a court may exercise jurisdiction over a defendant. Writing for the majority, Major J. held that irrespective of the real and substantial connection analysis, the attornment of one of the defendants by filing a statement of defence was sufficient to allow a court to exercise jurisdiction over that defendant.⁴² Yet he went on to make the statement, quoted above, that suggests that submission has been subsumed by the real and substantial connection test. But immediately thereafter he stated that "parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court",⁴³ which is entirely consistent with the notion that the traditional test is unaffected by *Morguard*.

We have already seen that in his dissent in *Beals*, LeBel J. concluded that the real and substantial connection test should be the sole test for jurisdiction. His concern was that "the traditional grounds may be more arbitrary and formalistic than they are fair and reasonable."⁴⁴ Yet on the issue of submission he noted that "because the defendant has chosen to have his day in court in the foreign forum, no unfairness results" from the court having taken jurisdiction.⁴⁵ In other words, he does not seem to envisage a situation where submission, alone and without more, would not amount to a proper basis for jurisdiction.

⁴⁰ See Castel and Walker, *supra* note 15 at 11.6-11.7.

⁴¹ *Supra* note 4 at 1103-1104.

⁴² *Beals*, *supra* note 17 at para. 34.

⁴³ *Ibid.* at para. 37.

⁴⁴ *Ibid.* at para. 209.

⁴⁵ *Ibid.* at para. 208.

As on the question of service in the province, the provincial courts in Ontario and British Columbia have not been consistent in their approach to the interplay between the real and substantial connection test and submission by the defendant. In fact, some courts have used the real and substantial connection test to determine that they lack jurisdiction, despite the fact that the defendants have taken steps that traditionally have been regarded as attorning to the court's jurisdiction.

In *Muscutt*, the Court of Appeal for Ontario stated that there are three ways in which jurisdiction may be asserted over a defendant outside Ontario, one of which is consent-based jurisdiction.⁴⁶ A court is permitted to take "jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court."⁴⁷ There was no suggestion in *Muscutt* that the real and substantial connection test is to be applied to cases of consent-based jurisdiction.⁴⁸

In contrast, in *Teja* and *Marren* the British Columbia Court of Appeal took an approach similar to that of LeBel J. in *Beals*.⁴⁹ In *Teja* the court was hearing an application by the plaintiffs for a declaration that it did not have jurisdiction over the dispute, which the plaintiffs wanted to litigate in the state of Washington. Interestingly, the court was faced with the plaintiffs' argument that the defendant's submission to the court's jurisdiction was irrelevant under the real and substantial connection test. Under the traditional approach, such submission would give the court jurisdiction. Using an approach like that in *Marren*, however, the court treated the defendant's voluntary submission as only one among other relevant factors in the determination of jurisdiction *simpliciter* using the real and substantial connection test.⁵⁰

One of the most problematic recent cases is *Shekhdar v. K & M Engineering and Consulting Corp.*⁵¹ The plaintiff brought an action in Ontario against the defendants, most of whom were from the United States. The Americans defended the action in Ontario. After hearing

⁴⁶ *Supra* note 7.

⁴⁷ *Ibid.* at para. 19.

⁴⁸ See also *Markandu (Litigation Guardian of) v. Benaroch* (2004), 71 O.R. (3d) 377 (C.A.) at para. 10, where the court stated: "Since the extra-provincial defendants (respondents) are not present in Ontario and have not consented to Ontario asserting jurisdiction, the courts of Ontario have jurisdiction to try this action only if the real and substantial connection test is met."

⁴⁹ See *Marren*, *supra* note 30 and accompanying text.

⁵⁰ *Teja*, *supra* note 16 at para. 29.

⁵¹ (2004), 71 O.R. (3d) 475 (S.C.J.) [*Shekhdar*].

evidence in the trial for two and a half days, Matlow J. asked the plaintiff and defendants for submissions with respect to Ontario's jurisdiction. It was only after this request that the defendants raised any objection to the court's jurisdiction. Matlow J. held that as against the American defendants the action should be "stayed" because there was no real and substantial connection between the action and Ontario.⁵²

In his decision, Matlow J. expressly rejected the plaintiff's argument that the Ontario court had jurisdiction over the dispute because the defendants had consented by defending the action and participating in the proceedings without objection. As authority, Matlow J. referred to the Court of Appeal for Ontario's statement in *Muscutt* that, based on *Morguard*, the proper exercise of jurisdiction must be based on both (a) order and fairness and (b) a real and substantial connection.⁵³ Matlow J. held that the consent of the parties could not serve to create jurisdiction in the absence of a real and substantial connection.⁵⁴ However, Matlow J. seems to have overlooked the statement in *Muscutt*, quoted above, that consent-based jurisdiction is an appropriate basis upon which a court may hear a dispute.⁵⁵

Matlow J. seemed particularly motivated to raise the issue because not only were the American defendants not connected to Ontario, but the plaintiff himself did not appear to be connected to Ontario in any way.⁵⁶ Yet it had been open to the defendants to bring a motion challenging the jurisdiction of the Ontario court under the *Rules of Civil Procedure*. If they had done so, rather than choosing to defend the action, the judge hearing the motion could have properly concluded on the facts that there was no real and substantial connection between Ontario and the action. However, the defendants did not bring a motion challenging jurisdiction, and the traditional test for taking jurisdiction based on attornment was more than satisfied based on the defendants' actions. As such, it is remarkable that Matlow J. chose to raise the issue of jurisdiction *simpliciter* on his own motion at the trial.

⁵² Ontario courts are frequently purporting to "stay" an action when the appropriate disposition would be to "dismiss" the action. Matlow J.'s disposition in *Shekhdar* is an example of this. See C. Dusten and S. Pitel, "The Right Answers to Ontario's Jurisdictional Questions: Dismiss, Stay or Set Service Aside" (2005) 30 *Advocates' Q.* 297.

⁵³ *Shekhdar*, *supra* note 51 at para. 27.

⁵⁴ *Ibid.* at para. 30.

⁵⁵ *Supra* note 7 at para. 19.

⁵⁶ A public policy argument appeared to underlie Matlow J.'s view of this case, in that he was concerned that two parties who have no connection whatsoever to Ontario could agree that they like Ontario's system of law and want to use Ontario's court system, and thereby its resources, to settle their dispute.

There are other instances of lower courts failing to accept that they have jurisdiction *simpliciter* over an action by virtue of the defendant having attorned to the jurisdiction. In *Deakin v. Canadian Hockey Enterprises* several defendants brought a motion challenging the Ontario court's jurisdiction to hear the plaintiff's action with respect to treatment of an injury sustained during a hockey tournament held in Quebec.⁵⁷ The court noted that one of the defendants, a British Columbia corporation, had filed a statement of defence in the action prior to the motion. Yet the court held that the real and substantial connection test was not met and therefore that it did not have jurisdiction over that defendant.⁵⁸ Similarly, in *International Furrier Group Inc. v. United Parcel Services Inc.* the defendant filed a notice of intent to defend and delivered a demand for particulars and a request to inspect documents.⁵⁹ Without any discussion of the role of these steps, the trial judge held that he had to apply the real and substantial connection test in order to determine whether the Ontario court had jurisdiction *simpliciter*, and concluded upon application of the test that it did not. Also, in *R.M. Maromi Investments Ltd. v. Hasco Inc.*, the defendant had filed a notice of intent to defend and the court noted that the defendant had attorned to Ontario's jurisdiction. Nevertheless, the judge went through a real and substantial connection analysis.⁶⁰

Despite the cases noted above, most courts view actions by defendants such as filing a notice of intent to defend or statement of defence as constituting attornment to the court's jurisdiction and conclude that they have jurisdiction *simpliciter* on that basis. There are several instances of lower courts in Ontario and British Columbia determining that they have jurisdiction due to the defendant's attornment.⁶¹

In all of the cases discussed thus far the defendants, after being served with the court's process, took positive steps that constituted attornment, such as filing a statement of defence. However, sometimes parties agree in advance of any dispute between them that if a dispute does arise, the parties will turn to the courts of a particular jurisdiction to resolve it. One of the ways jurisdiction by consent may be established is by an agreement nominating a particular court for the resolution of disputes; such an agreement may be enforced by a court by the exercise of jurisdiction.⁶²

⁵⁷ (2005), 7 C.P.C. (6th) 295 (Ont. S.C.J.) [*Deakin*].

⁵⁸ *Ibid.* at paras. 40-41.

⁵⁹ [2004] O.J. No. 1097 (S.C.J.) (QL) [*International Furrier*].

⁶⁰ (2004), 73 O.R. (3d) 298 (S.C.J.).

⁶¹ See e.g. *Bugera v. Schoenhals*, [1998] B.C.J. No. 1809 (S.C.) (QL); *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.); *Nova Tool & Mold Inc. v. Laich Industries Corp.*, [2001] O.J. No. 1458 (S.C.J.) (QL); *Stoymenoff v. Airtours PLC* (2001), 17 C.P.C. (5th) 387 (Ont. S.C.J.); *Kinch v. Pyle* (2004), 8 C.P.C. (6th) 66 (Ont. S.C.J.).

⁶² See Castel and Walker, *supra* note 15 at 11.6. See also Walker, *supra* note 13 at 17-

The Court of Appeal for Ontario in *Muscutt* also included “prior agreement to submit disputes to the jurisdiction of the domestic court” in its definition of consent-based jurisdiction.⁶³

Since prior agreement of the parties to submit to a court’s jurisdiction is considered to be part of traditional consent-based jurisdiction, it gives rise to the question of whether lower courts, after *Morguard*, are applying the real and substantial connection test where such a prior agreement exists. There are not many cases on this issue. Recently in *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc.* Master MacLeod, relying on *Shekhdar*, stated: “A forum selection clause will not induce a court to take jurisdiction if the action has no real and substantial connection with the jurisdiction.”⁶⁴

A more detailed analysis is found in *Linden Fabricating & Engineering (P.G.) Ltd. v. PSI Sales, Inc.*, in which the plaintiff, a British Columbia company, sued the defendant, an Alabama company, with respect to a licensing agreement entered into by the parties.⁶⁵ The agreement contained a clause stating that the defendant expressly submitted to the jurisdiction of the courts of British Columbia. The defendant brought an application to have service of the claim set aside.

The Master held that the defendant’s express attornment to the jurisdiction of British Columbia gave the court jurisdiction over the defendant such that service *ex juris* was permissible.⁶⁶ However, the Master further stated that “the forum selection clause in the Agreement [did] not displace the court’s ability to determine its jurisdiction over the matters in issue.”⁶⁷ The Master suggested that despite the presence of a forum selection clause, whether exclusive or not, “[i]t is for the court to determine by the real and substantial connection test whether or not it has jurisdiction or should exercise it.”⁶⁸ The Master held that the court had jurisdiction *simpliciter* in this case because there was a real and substantial connection between both the subject matter of the litigation and the defendant, on the one hand, and the British Columbia courts on the other.⁶⁹ The most significant factor in the finding that there was a real and substantial connection between the British Columbia courts and the

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⁶³ *Supra* note 7 at para. 19.

⁶⁴ [2005] O.J. No. 4604 (S.C.J.) (QL) at para. 28.

⁶⁵ [2003] B.C.J. No. 60 (S.C.) (QL), *aff’d* [2003] B.C.J. No. 1770 (S.C.) (QL) [*Linden*].

⁶⁶ *Ibid.* at para. 11.

⁶⁷ *Ibid.* at para. 12.

⁶⁸ *Ibid.* at para. 16.

⁶⁹ *Ibid.* at paras. 23-24.

defendant was that “the parties expressly chose [British Columbia] as the forum and the law to govern their disputes, and the defendant expressly submitted to the jurisdiction of the [British Columbia] courts.”⁷⁰

It is not clear in *Linden* why the British Columbia Supreme Court applied the real and substantial connection test. The court expressly stated that the defendant’s express attornment in the agreement gave the court jurisdiction, so it cannot be said that the court did not realize that there was a traditional basis upon which it could exercise jurisdiction in this case.⁷¹

On this issue, as on the previous one, the case law is divided. Here it is equally important to give credence to the argument from authority. Consent-based jurisdiction also has long roots in our history. As with presence-based jurisdiction, the onus should be on those who would abandon submission as an independent basis for jurisdiction to so justify. As with the cases on service in a province, it cannot be firmly stated that the Supreme Court of Canada requires the real and substantial connection test to be applied in cases of submission, or has provided any justification for such a change. As a matter of precedent provincial courts should continue to treat submission as a separate and traditional basis for jurisdiction.

The reasoning of lower courts on this issue is particularly troubling. We have noted Major J.’s contradictory paragraph in *Beals* and its potential to create confusion. Yet in none of the cases discussed above where courts have failed to recognize that they have jurisdiction *simpliciter* by virtue of a defendant’s attornment did they make reference to *Beals* as authority for such a significant change in the law. They do not suggest a rationale, either in principle or in practice, for abandoning consent-based jurisdiction.

Several arguments support consent-based jurisdiction. First, it promotes certainty, in that parties know that jurisdiction will not be an issue where the defendant has consented. Second, it accords with notions of fairness and the reasonable expectations of the parties. It is hard to see the merit in allowing a defendant who has submitted to a province’s courts by agreement or conduct to argue subsequently that those courts lack jurisdiction. Third, *forum non conveniens* remains open to the defendant, although in a sensibly limited form in cases of submission by contract.⁷² The predictability engendered by consent-based jurisdiction is critical to holding parties either to their contractual agreements to litigate in a

⁷⁰ *Ibid.* at para. 23.

⁷¹ *Ibid.* at para. 11.

⁷² See the approach in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, which held that the defendant faces an uphill battle to avoid litigation in the forum chosen

particular forum or to the reliance induced by their mounting of a defence on the merits. Accordingly, submission by the defendant should be retained as a separate basis for jurisdiction.

Considering both the first and second questions in this article, we should remember that the real and substantial connection test plays an important role on issues both of jurisdiction and of recognition and enforcement of foreign judgments, and that it is likely to have a very similar meaning in both contexts. In the latter context, the traditional rule was that a foreign judgment would only be recognized and enforced if the foreign court took jurisdiction based on the defendant's presence or submission. This rule was too narrow: it prevented the enforcement of too many foreign judgments. But the central strength of the rule was its predictability. Plaintiffs and defendants could make accurate predictions about whether a foreign court's judgment against them would be recognized and enforced elsewhere. While it was a welcome development when *Morguard* expanded the test for recognition and enforcement, it would be a significant weakening of the law if those predictable bases for jurisdiction were swept away. It would be strange indeed to allow a defendant who had defended on the merits in a foreign court to then argue, at the enforcement stage, that the court lacked jurisdiction based on the real and substantial connection test. The traditional bases of presence and submission need to be preserved, both in the context of recognition and enforcement and also where a province's courts take jurisdiction.

The Real and Substantial Connection Test in International Cases

Morguard was an interprovincial case, and so it did not resolve the issue of whether the courts would require a real and substantial connection to take jurisdiction over a defendant not in another province but rather in a foreign country. Two subsequent Supreme Court of Canada decisions support the proposition that the real and substantial connection test extends to that context. First, the court's broad language in *Tolofson* did not distinguish between interprovincial and international situations. Second, and more importantly, in *Beals*, in the context of the test for recognition and enforcement of a foreign judgment, the court held that the real and substantial connection test applied equally to both types of judgment. For the majority Major J. stated: "While there are compelling reasons to expand the test's application, there does not appear to be any principled reason not to do so."⁷³

However, the issue remains unclear in light of the court's decision in

by contract.

⁷³ *Supra* note 17 at para. 19.

*Spar Aerospace Ltd. v. American Mobile Satellite Corp.*⁷⁴ In that case the court considered to what extent the real and substantial connection test was relevant to the determination of whether a Quebec court could properly exercise jurisdiction over an action involving out-of-province defendants. The corporate plaintiff had brought an action in Quebec against four corporate defendants from the United States for damages to a satellite. The defendants brought a motion challenging the jurisdiction of the Quebec court. The defendants argued that jurisdiction could not be exercised solely on the basis of article 3148(3) of the *Civil Code of Québec*,⁷⁵ which provides that a Quebec authority has jurisdiction where damage was suffered in Quebec, and that the real and substantial connection test must be met in order for jurisdiction to be assumed.⁷⁶

For a unanimous court, LeBel J. held that the real and substantial connection test was not an additional criterion that had to be satisfied, because it did not apply to the taking of jurisdiction over defendants outside of Canada.⁷⁷ LeBel J. agreed that *Morguard* established a rule whereby a court can only assume jurisdiction where a real and substantial connection exists. However, he held that *Morguard* was decided in the context of an interprovincial jurisdictional dispute and that its specific findings “cannot easily be extended beyond this context.”⁷⁸ This was because *Morguard* spoke “directly to the context of interprovincial comity within the structure of the Canadian federation.”⁷⁹

At the time *Spar* was decided, the position in both Ontario and British Columbia was that the real and substantial connection test did apply to taking jurisdiction over an international defendant.⁸⁰ Simply bringing the case within the relevant rule of civil procedure authorizing service outside the province was not sufficient. In *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.* a British Columbia company brought an action in British Columbia against a Colorado law firm.⁸¹ The British Columbia Court of Appeal held that it was “common ground that the test to be applied in determining whether the [British Columbia] Supreme Court has jurisdiction over these proceedings is whether there is a real and

⁷⁴ [2002] 4 S.C.R. 205 [*Spar*].

⁷⁵ S.Q. 1991, c. 64.

⁷⁶ *Supra* note 74 at para. 45.

⁷⁷ *Ibid.* at para. 51.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* See the critique of this reasoning in V. Black and J. Walker, “The Deconstitutionalization of Canadian Private International Law?” (2003) 21 Sup. Ct. L.Rev. (2d) 181 at 190-195.

⁸⁰ As noted by Black and Walker, *ibid.* at 188.

⁸¹ (1997), 143 D.L.R. (4th) 213 (B.C.C.A.) [*Cook*].

substantial connection between the court and either the defendant ... or the subject-matter of the litigation.”⁸² Because the real and substantial connection test was not met in *Cook*, the British Columbia court did not have jurisdiction *simpliciter*. Leave to appeal to the Supreme Court of Canada in *Cook* was denied,⁸³ yet the case was not mentioned by LeBel J. in his analysis in *Spar*.⁸⁴

In Ontario, the leading case on the taking of jurisdiction is *Muscutt*. This was an interprovincial case, but its four companion cases involved defendants outside Canada.⁸⁵ In each of the companion cases, the Court of Appeal for Ontario applied the real and substantial connection test to determine whether Ontario had jurisdiction over the dispute. In each of them, the court held that it did not have jurisdiction because the connection was not satisfied.

One might have expected plaintiffs to place considerable reliance on *Spar* in any subsequent dispute about jurisdiction involving an international defendant. To the extent *Spar* is at odds with *Muscutt* and *Cook*, it is a more recent decision of a higher court and so stands as a powerful precedent. On its face it makes it much easier for the plaintiff to establish the court’s jurisdiction over defendants outside Canada. Yet *Spar* has not been widely cited by the lower courts in Ontario and British Columbia. In fact, in both provinces *Spar* has had essentially no impact on the way lower courts consider whether they can exercise jurisdiction in an international dispute. Since *Spar*, the *Muscutt* quintet and *Cook* are nevertheless being followed consistently by lower courts in Ontario and British Columbia on this issue. The overwhelming majority of lower court decisions have applied the real and substantial connection test in order to determine whether they can properly exercise jurisdiction over defendants outside of Canada.⁸⁶ In none of these cases have the courts mentioned *Spar* and its reasoning. Further, to the extent that the Supreme Court of Canada’s subsequent decision in *Beals* undercuts *Spar* on this issue, lower courts

⁸² *Ibid.* at para. 20.

⁸³ (1997), 223 N.R. 79.

⁸⁴ See Black and Walker, *supra* note 79 at 191-92.

⁸⁵ *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.); *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (C.A.); *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84 (C.A.); *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76 (C.A.).

⁸⁶ In Ontario, see for example *Barrick Gold Corp. v. Blanchard & Co.* (2003), 9 B.L.R. (4th) 316 (Ont. S.C.J.) [*Barrick*]; *Shane v. JCB Belgium N.V.*, [2003] O.J. No. 4497 (S.C.J.) (QL); *Asgari v. Canadian Universities Travel Service Ltd.*, [2003] O.J. No. 4877 (S.C.J.) (QL); *1092072 Ontario Inc. (c.o.b. Elfe Juvenile Products) v. Kids II, Inc.*, [2003] O.J. No. 4166 (S.C.J.) (QL); *Danks, supra* note 31; *Samson v. Hooks Industrial Inc.* (2003), 42 C.P.C. (5th) 299 (Ont. S.C.J.); *Stanley v. Stanley*, [2003] O.J. No. 1246 (S.C.J.) (QL); *Moon v. Sher*, [2003] O.J. No. 2463 (S.C.J.) (QL), *aff’d* [2004] O.J. No.

have continued after *Beals* to apply the real and substantial connection test in actions against defendants outside Canada for the purpose of determining whether they have jurisdiction *simpliciter*.⁸⁷ For example, in refusing to take jurisdiction in *Bangoura v. Washington Post* the Court of Appeal for Ontario stated: "The recent judgment of the Supreme Court of Canada in *Beals* ... has made it clear that the real and substantial connection test applies to international cases."⁸⁸

In *Hunt v. T&N PLC*, the Supreme Court of Canada confirmed that the real and substantial connection requirement for taking jurisdiction over defendants in another province was not merely a rule of common law, but rather was a constitutional requirement.⁸⁹ The court has never held, however, that the same requirement is constitutionally mandated in cases involving international defendants, and it can be argued that such a decision is unlikely.⁹⁰ Accordingly, the cases applying the real and substantial connection test to international defendants are doing so as a common law requirement. Given this, it can be argued that *Spar*, as a case on appeal from Quebec, is a civil law decision and does not change the

3942 (C.A.) (QL); *M.J. Jones Inc. v. Kingsway General Insurance Co.*, [2003] O.J. No. 4409 (S.C.J.) (QL), aff'd (2004), 185 O.A.C. 113 (C.A.); *C.B. Distribution Inc. v. BCB International Inc.* (2003), 33 C.P.C. (5th) 203 (Ont. S.C.J.) [*C.B. Distribution Inc.*]. In British Columbia, see for example *Roth v. Interlock Services, Inc.*, [2003] B.C.J. No. 472 (S.C.) (QL), varied (2004), 33 B.C.L.R. (4th) 60 (C.A.) [*Roth*]; *Edwards v. Bell*, [2003] B.C.J. No. 2467 (S.C.) (QL); *JLA & Associates Inc. v. Kenny* (2003), 41 C.P.C. (5th) 151 (B.C.S.C.) [*JLA & Associates*]; *Linden*, *supra* note 65.

⁸⁷ See for example *Verbora v. Allstate Insurance Co. of Canada*, [2003] O.J. No. 5298 (S.C.J.) (QL), leave to appeal to Div. Ct. granted, [2004] O.J. No. 732 (S.C.J.) (QL); *Roth*, *ibid.*; *6012621 Canada Inc. v. J&R Electronics Inc.*, [2004] O.J. No. 1768 (S.C.J.) (QL) [*6012621 Canada Inc.*]; *Bangoura v. Washington Post* (2004), 235 D.L.R. (4th) 564 (Ont. S.C.J.), rev'd (2005), 258 D.L.R. (4th) 341 (Ont. C.A.) [*Bangoura*]; *Grammercy Ltd. v. Dynamic Tire Corp.* (2004), 69 O.R. (3d) 210 (S.C.J.); *Trizec Properties Inc. v. Citigroup Global Markets Inc.*, [2004] O.J. No. 323 (S.C.J.) (QL) [*Trizec*]; *McCrea v. Philips Electronics Ltd.* (2004), 43 C.P.C. (5th) 388 (Ont. S.C.J.); *Kolibri Capital Corp. v. LSOFCanada I, L.P.*, [2004] O.J. No. 1468 (S.C.J.) (QL); *International Furrier*, *supra* note 59 at para. 17.

⁸⁸ *Bangoura*, *ibid.*, at para. 20. See also *Doiron v. Bugge* (2005), 258 D.L.R. (4th) 716 (Ont. C.A.) [*Doiron*].

⁸⁹ [1993] 4 S.C.R. 289 at 324-26.

⁹⁰ See however Black and Walker, *supra* note 79 at 193-94, arguing that the real and substantial connection test could be seen as a constitutional limit on taking jurisdiction in both interprovincial and international cases. At issue here is whether the real and substantial connection test flows from obligations to other provinces, in the nature of a "full faith and credit" requirement, or from the constitutional limits on the authority of provincial courts. If it is the latter, these limits could apply in both types of case.

common law.⁹¹ The real and substantial connection test remains part of the law on jurisdiction for the common law provinces, but in Quebec is only necessary, as a matter of constitutional law, where the defendant is in another province.

In *Spar*, LeBel J.'s statements are not expressly confined to the civil law – quite the opposite, given how generally they are framed – yet this may be an acceptable way of distinguishing a decision that, in any event, has not been followed in the common law provinces. It does, however, leave open the prospect that Quebec's ability to take jurisdiction over international defendants will be greater than that of the other provinces, something that may seem at odds with Canadian federalism. In any case, at least as far as the common law provinces are concerned, the accepted answer to this question is that the real and substantial connection test applies to international and interprovincial cases alike.

Relationship between the Real and Substantial Connection Test and the Provincial Rules

In *Spar*, the Supreme Court of Canada held that the plaintiff did not need to establish a real and substantial connection in order for the Quebec court to take jurisdiction. It was therefore not necessary to the court's decision for it to address whether such a connection was present. However, in his decision LeBel J. went on to state that the traditional heads of jurisdiction found in provincial rules of civil procedure could be understood as the embodiment of the *Morguard* real and substantial connection test. In other words, the provisions of the *Civil Code of Québec* were already drafted so as to ensure that the Quebec courts could not assert jurisdiction in an action without there being a real and substantial connection between the action and the province.⁹² This position raises the more general question of whether the same can be said of the civil procedure rules of other provinces regarding service *ex juris*.

In Ontario, rule 17.02 of the *Rules of Civil Procedure* allows a party to a proceeding to be served outside Ontario with an originating process, without leave, where the proceeding consists of claims enumerated in that rule.⁹³ Both before and after *Spar*, Ontario courts have overwhelmingly

⁹¹ J. Walker, "Must there be Uniform Standards for Jurisdiction within a Federation?" (2003) 119 L.Q.R. 567 at 569. See also Black and Walker, *supra* note 79 at 195-98. For a contrary view, see E. Edinger, "*Spar Aerospace*: A Reconciliation of *Morguard* with the Traditional Framework for Determining Jurisdiction" (2003) 61 The Advocate 511 at 511, arguing that *Spar* "speaks equally to common law Canada and to civil law Quebec."

⁹² *Supra* note 74 at para. 56.

⁹³ *Supra* note 1. Rule 17.02(g) refers to torts that are committed in Ontario, and Rule

not treated rule 17.02 as subsuming the real and substantial connection test. One exception to this is *Duncan (Litigation Guardian of) v. Neptunia Corp.*, in which Wright J. stated that rule 17.02(h) in itself was sufficient to confer jurisdiction on an Ontario court.⁹⁴ Wright J. also suggested that if he were wrong, in that the real and substantial connection test was to be “imported” into the rule, then the rule required amendment.⁹⁵ Other Ontario Superior Court of Justice decisions have refused to follow *Duncan*, holding instead that fitting into rule 17.02 is not sufficient to establish jurisdiction *simpliciter* and that the real and substantial connection test must also be satisfied.⁹⁶

Most importantly, the Court of Appeal for Ontario took a clear position on this issue in *Muscutt*, holding that rule 17.02(h) does not by itself confer jurisdiction.⁹⁷ It is “part of a procedural scheme that operates within the limits of the real and substantial connection test.”⁹⁸ *Muscutt* has been consistently followed by lower courts in Ontario on this point.⁹⁹ For example, in *Barrick Gold Corp. v. Blanchard and Co.*, Nordheimer J. cited *Muscutt* and held that even if the Ontario plaintiff’s claim against a Louisiana company fell within rules 17.02(g) and (h), he had to determine whether there was a real and substantial connection between Ontario and the claim before jurisdiction *simpliciter* was established.¹⁰⁰ The Ontario courts have not treated *Spar* as altering this approach. In *Benquesus v. Proskauer, Rose, LLP* the Superior Court of Justice expressly rejected the proposition that *Spar* has altered the law of Ontario as it was expressed in *Muscutt*.¹⁰¹

In British Columbia, rule 13(1) of the *Supreme Court Rules* allows plaintiffs to serve defendants outside of the province without leave in certain enumerated circumstances similar to those found in Ontario’s rule

17.02(h) refers to damage sustained in Ontario.

⁹⁴ (2001), 53 O.R. (3d) 754 (S.C.J.) at para. 98 [*Duncan*].

⁹⁵ *Ibid.* at para. 99.

⁹⁶ See e.g. *Elawar v. Fédération des Clubs de Motoneigistes du Québec Inc.* (2001), 57 O.R. (3d) 232 (S.C.J.); *Skylink Express Inc. v. All Canada Express Ltd.* (2001), 17 C.P.C. (5th) 380 (Ont. S.C.J.); *Milligan v. Lines Overseas Management (Cayman) Ltd.* (2002), 18 C.C.E.L. (3d) 96 (Ont. S.C.J.).

⁹⁷ *Supra* note 7 at para. 48.

⁹⁸ *Ibid.* at para. 50.

⁹⁹ See e.g. *C.B. Distribution Inc.*, *supra* note 86; *Barrick*, *supra* note 86; *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.); *Hirsi v. Swift Transportation Co.* (2004), 1 C.P.C. (6th) 135 (Ont. S.C.J.); *Bangoura*, *supra* note 87; *International Furrier*, *supra* note 59. See also *Doiron*, *supra* note 88.

¹⁰⁰ *Barrick*, *ibid.* at paras. 30-31.

¹⁰¹ [2004] O.J. No. 692 (S.C.J.) (QL), *aff’d* [2005] O.J. No. 43 (C.A.) (QL) at para. 35.

17.02. In 2000, the British Columbia Court of Appeal had held in *Strukoff v. Syncrude Canada Ltd.* that: “[r]ule 13(1) sets out specific factors that are presumed to satisfy the real and substantial connection test” and that “[n]ormally it is only when the proceedings do not fall within the Rule 13(1) criteria that the real and substantial test must be canvassed, on an application under Rule 13(3) for leave to serve outside British Columbia.”¹⁰²

More recently, however, the British Columbia Court of Appeal has changed its approach.¹⁰³ In *Marren* the court discussed the interplay between the rules allowing service outside the province and the real and substantial connection test.¹⁰⁴ This case dealt with a proposed class action by the plaintiffs, an Alberta resident and British Columbia resident, with respect to employment contracts for work in Nunavut, entered into in Alberta with an Alberta-based company. The court overturned the decision of the chambers judge, who, based on *Strukoff*, had held that compliance with rule 13(1) gave rise to a rebuttable presumption that the real and substantial connection test had been met. With regard to the decision of the chambers judge, the court stated:

While he acknowledged that compliance with one of the criteria in Rule 13(1) does not in itself confer jurisdiction on the court, the chambers judge’s formulation of the ratio from *Strukoff*... led him to give too much weight to one guideline for the assumption of jurisdiction, and insufficient weight to other factors that form part of the test for jurisdiction simpliciter since the reworking of this area of the law by the Supreme Court of Canada in recent years.¹⁰⁵

The court then held that although the provisions of rule 13(1) are a “good place to start” and can be seen as relevant connecting factors in the real and substantial connection test, those provisions are not determinative of

¹⁰² (2000), 80 B.C.L.R. (3d) 294 (C.A.) at para. 10 [*Strukoff*]. See also *Furlan v. Shell Oil Co.*, [2000] 7 W.W.R. 433 (B.C.C.A.). Based on these decisions Edinger argued (*supra* note 91 at 516) that “Satisfaction of a subrule amounts to satisfaction of the requirement for a real and substantial connection.” Her article does not incorporate the more recent decisions by the British Columbia Court of Appeal rejecting the *Spar* approach, but it may provide insight into why some lower courts in British Columbia may still be reluctant to discontinue their use of that approach. For example, they may agree with Edinger that *Spar* promotes rationalization of the jurisdictional approach, clarifies analysis, and leads to more efficient arguments.

¹⁰³ The language used in *Marren*, *supra* note 30 at para. 12 suggests that the court was merely clarifying the proper interpretation of *Strukoff*, *ibid.* However, this case arguably represents a significant change from the court’s earlier approach.

¹⁰⁴ *Marren*, *ibid.*

¹⁰⁵ *Ibid.* at para. 12.

jurisdiction *simpliciter*.¹⁰⁶ The court also rejected the argument that *Spar* enunciated a different approach to the use of the rules in the taking of jurisdiction than that adopted by the British Columbia Court of Appeal¹⁰⁷ and the Court of Appeal for Ontario in *Muscutt*.¹⁰⁸

The British Columbia Court of Appeal has recently reiterated this approach in *UniNet Technologies Inc. v. Communication Services Inc.*¹⁰⁹ In that case, a British Columbia company brought an action against a company incorporated in Samoa with respect to a dispute over an internet domain name. The plaintiff claimed to be entitled to serve the defendant outside of British Columbia under rule 13(1) on the basis that there had been a breach of contract and tort committed in British Columbia. With respect to the relationship between rule 13(1) and the concept of jurisdiction *simpliciter*, the court stated:

Certainly on a reading of [rule] 13(1), one might be forgiven for assuming that if a particular fact situation falls within any of the subrules thereof, so that the defendant may be served without leave, the Supreme Court of British Columbia must have jurisdiction. But this is no longer the case, if it ever was. Since the enunciation and evolution of the “real and substantial connection” principle by the Supreme Court of Canada in the seminal cases of [(inter alia) *Moran v. Pyle National (Canada) Ltd.*, *Morguard*, and *Tolofson v. Jensen*], the only test for jurisdiction *simpliciter* is, to quote this court in *Marren*, “whether the plaintiff has established there is a ‘real and substantial connection between the court and either the defendant or the subject-matter of the litigation’”... Indeed it was held in *Marren* that the application of one or more of the subrules of [rule] 13(1) does not even give rise to a rebuttable presumption of jurisdiction *simpliciter*.¹¹⁰

Despite the clarity in *Marren* and *UniNet*, the treatment of the rules for service *ex juris* by lower courts in British Columbia is still inconsistent. Several decisions have failed to follow *Marren*. For example, in *Na v. Renfrew Security Bank & Trust (Offshore) Ltd.* the judge concluded that jurisdiction *simpliciter* is established “as of right” under rule 13(1) and only conducted a real and substantial connection analysis in case he was wrong on that point.¹¹¹ The judge conceived of rule 13(1) as being “the legislative drafting of the real and substantial connection test.”¹¹² In *Great Canadian Gaming Corp. v. Allegiance Capital Corp.*, the court held that a

¹⁰⁶ *Ibid.* at para. 13.

¹⁰⁷ Presumably the court was referring to its decision in *Teja*. In that case, the court held that the traditional bases for taking jurisdiction are not determinative of jurisdiction *simpliciter*, but rather are relevant connecting factors in the real and substantial connection test. See *Teja*, *supra* note 16 at para. 24.

¹⁰⁸ *Marren*, *supra* note 30 at para. 15.

¹⁰⁹ (2005), 251 D.L.R. (4th) 464 (B.C.C.A.) [*UniNet*].

¹¹⁰ *Ibid.* at para. 20.

¹¹¹ (2003), 16 B.C.L.R. (4th) 345 (S.C.).

¹¹² *Ibid.* at para. 40.

real and substantial connection is established *prima facie* if a claim falls within one of the categories under rule 13(1).¹¹³ Similarly, the court in *JLA & Associates* held that falling into rule 13(1) creates a rebuttable presumption of jurisdiction *simpliciter*.¹¹⁴

This issue was recently reviewed in *Burke v. NYP Holdings, Inc.*¹¹⁵ For the court, Burnyeat J. held: "It cannot be said with certainty that the qualification of an action under Rule 13(1) establishes *jurisdiction simpliciter*. Rather, the Court may exercise jurisdiction only if it has a 'real and substantial connection' with the subject matter of the litigation."¹¹⁶ This decision relied on *Roth*, where the British Columbia Court of Appeal held: "That the matter falls within one of the traditional categories for assumption of jurisdiction is not the end of the inquiry... there must be a substantial connection between the cause of action and British Columbia in order to justify bringing the foreign respondents within the jurisdiction."¹¹⁷

Overall, it again appears that *Spar*'s impact on the way appellate and lower courts in the common law provinces are deciding whether they may exercise jurisdiction is insignificant. The position in Ontario, based on *Muscutt*, is firmly established and the number of British Columbia cases continuing to follow *Strukoff* rather than the more recent appellate cases is likely to diminish. More importantly, the approach suggested by LeBel J. in *Spar* is open to serious criticism. The real and substantial connection test is the response to perceived concerns about the need for a limit on the ability of a provincial court to take jurisdiction. If the provincial bases for service *ex juris* somehow, as enacted through the regulatory process, already comply with the real and substantial connection test, how is that test in any way serving a limiting function? Precisely because it is open to the provinces to otherwise enact broad bases for taking jurisdiction, the real and substantial connection test must operate alongside those bases as a further screen. The evolution of the jurisprudence in British Columbia, in particular, shows a recognition of the force of this criticism.

Conclusion

It should be clear from this article that the courts in Ontario and British Columbia are frequently called upon to apply the Supreme Court of

¹¹³ [2003] B.C.J. No. 2717 (S.C.) (QL) at para. 20.

¹¹⁴ *Supra* note 86 at para. 22.

¹¹⁵ (2005), 16 C.P.C. (6th) 382.

¹¹⁶ *Ibid.* at para. 26. See also *CRS Forestal v. Boise Cascade Corp.* (1999), 36 C.P.C. (4th) 283 (B.C.S.C.) at paras. 10, 46.

¹¹⁷ *Supra* note 86 at paras. 18-19.

Canada's new approach to jurisdiction. The sheer number of cases in which jurisdiction is called into question highlights the value of having clear, precise guidance from the Supreme Court of Canada. The court must endeavour to avoid language, even in passing, that will confuse the issue for provincial courts.

This article has analyzed four questions about jurisdiction raised by *Morguard* and subsequent Supreme Court of Canada decisions. In addition to explaining the answers which have been adopted by the courts of British Columbia and Ontario, each of the previous sections has attempted to set out a principled answer. On some of these questions the cases suggest that the courts are struggling to understand how the real and substantial connection requirement relates to the traditional approach to jurisdiction. The courts risk becoming lost in the transition from the old approach to the new. The confusion in the case law suggests that we should be concerned about the clarity of the Supreme Court of Canada's decisions on jurisdiction, the way in which they are being applied, or both. What would be most welcome is clearer judicial answers to each of these questions.