

Docket: 10/20

2011 NLCA 17

COURT OF APPEAL

BETWEEN:

APPELLANT

AND:

FIRST RESPONDENT

AND:

SECOND RESPONDENT

AND:

THIRD RESPONDENT

AND:

FOURTH RESPONDENT

AND:

FIFTH RESPONDENT

AND:

KEEWATIN TRIBAL COUNCIL
INC.

SIXTH RESPONDENT

AND

Docket: 10/21

BETWEEN:

DERRICK FEWER

APPELLANT

AND:

SAYISI DENE EDUCATION
AUTHORITY

FIRST RESPONDENT

AND:

SAYISI DENE CHIEF ERNIE
BUSSIDOR

SECOND RESPONDENT

AND:

SAYISI DENE FIRST NATION
COUNCIL

THIRD RESPONDENT

AND:

SAYISI DENE FIRST NATION

FOURTH RESPONDENT

AND:

KEEWATIN TRIBAL COUNCIL
INC.

FIFTH RESPONDENT

Coram: White, Harrington and Hoegg, JJ.A.

Court Appealed From: Supreme Court of Newfoundland & Labrador, Trial
Division (General) 200901T2450 and 200901T2451

Appeal Heard: December 7, 2010

Judgment Rendered: February 18, 2011

Reasons for Judgment by White, J.A.

Concurred in by Harrington and Hoegg, JJ.A.

Counsel for the Appellant (both appeals): John Dawson and John Taylor-
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appeal): Olga R. McWilliam Benson

White, J.A.:

[1] This is an appeal of two decisions released on the same day dismissing the claims of the appellant (Fewer) for want of jurisdiction *simpliciter*, or “territorial jurisdiction”, the term preferred by the applications judge. The first decision (**Fewer v. Ellis**, 2010 NLTD 35) relates to a claim for damages arising out of an alleged assault (the “tort action”). The second decision (**Fewer v. Sayisi Dene Education Authority**, 2010 NLTD 36) relates to a claim for damages for breaches of four contracts (the “contract action”). The appeals of both decisions were heard together. While I will principally discuss the first decision in these reasons, my analysis applies equally to the second decision.

BACKGROUND

[2] Fewer, a resident of the Province of Newfoundland and Labrador, alleges that he was assaulted by the first respondent (Ellis) while Fewer was employed as principal and teacher at the Peter Yassie Memorial School in the Community of Tadoule Lake in the Province of Manitoba. Fewer commenced the tort action in the Province of Newfoundland and Labrador by statement of claim seeking damages against Ellis and the second through sixth respondents. Fewer’s claim against these respondents alleged their failure to maintain care and control of the school and failure to take

necessary steps to ensure Fewer's safety. Vicarious liability for the negligence of Ellis was also pleaded.

[3] The applications judge succinctly summarized the contract action, stating:

[3] The contracts pleaded by Fewer relate to his work at the Tadoule Lake school. Specifically the statement of claim refers to; the research for and preparation of reports; travel expenses incurred in obtaining school supplies; retroactive pay; and pay for additional responsibilities over and above his work as Principal. Fewer claims special and general damages and asserts, apparently on the basis of his having sent to Manitoba from this province documents in support of his entitlement, that the alleged breaches of contract occurred in this province.

[4] The contracts asserted in the statement of claim clearly contemplate performance in and only in Manitoba. Fewer says that he performed his obligations under these contracts in Manitoba, but that he has not yet been paid in full...

[4] The second, third, fourth and fifth respondents in respect of the first decision and the first, second, third and fourth respondents in respect of the second decision (collectively, the Sayisi Dene respondents) subsequently applied to have service of both statements of claim set aside, pursuant to Rule 10.05(1)(a), **Rules of the Supreme Court, 1986**, and for a stay of proceedings on the basis that the Supreme Court of Newfoundland and Labrador lacked jurisdiction *simpliciter*. Alternatively, the Sayisi Dene respondents requested that, should the court find that it had jurisdiction, it should nonetheless decline to exercise that jurisdiction because Manitoba would be a more convenient and appropriate forum.

[5] Ellis and Keewatin Tribal Council Inc. did not file a defence or otherwise participate in the trial or the appeal.

[6] In his decisions, the applications judge found that the Supreme Court of Newfoundland and Labrador lacked jurisdiction *simpliciter* to adjudicate the claims. He, therefore, dismissed both actions against all defendants.

[7] Fewer now appeals the orders of the applications judge.

ISSUES

[6] As stated in the appellant's factum, this appeal raises the following issues:

- (1) Did the applications judge err in law in failing to first determine which forum or venue is more appropriate in the particular circumstances of the specific proceeding which is before the Court?
- (2) Did the applications judge err in failing to include the concept of “fairness” to the Appellant in deciding the issue of jurisdiction *simpliciter*? If so, was the real and substantial connection test satisfied in this case? If not, did the applications judge properly apply the test, i.e. was there a real and substantial connection?
- (3) Did the applications judge err in law and wrongly apply the established conflicts of laws procedure and specifically fail to adjudicate that if the Province of Newfoundland and Labrador was an inappropriate forum, there was clearly an appropriate forum, which the Respondents were not opposing, being the Province of Manitoba, for “the pursuit of the action and for securing the ends of Justice”?
- (4) Did the applications judge err in law in failing to find that if the matter did not have a real and substantial connection to the Province of Newfoundland and Labrador, the appropriate ruling would have been to allow the Appellant to prosecute his claim in the Province of Manitoba?
- (5) Did the applications judge err in law in dismissing the Appellant’s Statement of Claim when the remedy sought by the Respondents’ Application was a stay of proceedings?

LAW AND ANALYSIS

- (1) ***Did the applications judge err in law in failing to first determine which forum or venue is more appropriate in the particular circumstances of the specific proceeding which is before the court?***

[8] This argument was not urged by Fewer at the hearing before this Court. The difficulty with this proposition is that a consideration of which venue is the more appropriate necessarily assumes that there are, at a minimum, two appropriate venues (see **Muscutt v. Courcelles** (2002), 160 O.A.C. 1 at para. 40). The Sayisi Dene respondents conceded at the hearing that the Manitoba Courts could possibly assume jurisdiction over this matter.

Whether the Supreme Court of Newfoundland and Labrador can properly assume jurisdiction, however, is squarely in issue in this case.

[9] It is settled law that territorial jurisdiction, which is a constitutional question, must be established before a court commences a *forum conveniens* analysis.

[10] As LaForest J. pointed out in **Hunt v. T. & N. plc**, [1993] 4 S.C.R. 289, "... courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place". As noted by the applications judge "... territorial jurisdiction cannot be conferred by a rule of court. The question is the extent to which the Canadian constitution permits a provincial superior court to extend its reach beyond its home jurisdiction" (Trial decision, para. 7).

[11] It would be an odd result if a court determined that it was the most appropriate forum but then continued on to find that it cannot constitutionally assume jurisdiction. The issue of jurisdiction *simpliciter*, therefore, must be determined before the issue of *forum conveniens* can be considered.

[12] The applications judge followed the correct procedure. If a court finds that it does not have jurisdiction *simpliciter*, it cannot go on to consider whether it is a convenient forum. The analysis ends with the determination of the jurisdiction *simpliciter* issue.

(2) Did the applications judge err in failing to include the concept of "fairness" to the Appellant in deciding the issue of jurisdiction simpliciter?

[13] The applications judge in his reasons canvassed the relevant cases, academic commentary and principles bearing on this issue. While order and fairness concerns are at the heart of a court's determination of whether it can assert jurisdiction, I agree with his analysis and conclusion that "fairness" should not form an independent consideration in deciding whether a real and substantial connection exists.

[14] This is an area of law where the principles appear to be if not unsettled, at least in a state of flux. It is necessary, therefore, to proceed first with a discussion of general principles before turning to the specific submissions made by the appellants.

- ***Morguard and the Real and Substantial Connection Test***

[15] The law in Canada with respect to conflict of laws, particularly in relation to assumed jurisdiction, has evolved significantly since the decision in **Morguard Investments Ltd. v. De Savoye**, [1990] 3 S.C.R. 1077.

[16] In **Morguard**, LaForest J. expanded the grounds upon which a court could assert jurisdiction over a defendant. In that case, Morguard Investments Ltd. sought to enforce a judgment in British Columbia which had been rendered in Alberta. LaForest J. held that the issue of the enforcement of foreign judgments and the issue of jurisdiction were correlative within the Canadian federation; where the court of a province had properly assumed jurisdiction over a matter, an order of that court would be enforceable in another province. The problem in that case was that De Savoye had not been served in Alberta and had not attorned to the jurisdiction of the Alberta court. The traditional bases for asserting jurisdiction (presence or consent) were therefore not present, with the result that the judgment was unenforceable in British Columbia.

[17] Justice LaForest conducted a review of the case law relating to when courts can assume jurisdiction, and went on to discuss the theoretical underpinnings of modern conflict of laws rules, stating: "...what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice".

[18] The facts of that case were intimately tied to the province of Alberta. De Savoye, however, had moved to British Columbia and had no property to satisfy the judgment in Alberta. LaForest J. commented on the unfairness to plaintiffs that could result in these types of situations, stating at pp. 1102-1103:

...It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides whatever the inconvenience and costs this may bring and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?

[19] Justice LaForest then continued by considering the countervailing concern of fairness to the defendant, stating at p. 1103:

These concerns, however, must be weighed against fairness to the defendant. I noted earlier that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and I added that recognition in other provinces should be dependent on the fact that the court giving judgment “properly” or “appropriately” exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest, or at least significant, contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit... Thus fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly-restrained jurisdiction.

(Underlining added)

[20] Building on the reasoning in **Indyka v. Indyka**, [1969] 1 A.C. 33 and **Moran v. Pyle National (Canada) Ltd.**, [1975] 1 S.C.R. 393, LaForest J. in **Morguard** held that a court of a province could properly assume jurisdiction over a defendant where there was a “real and substantial connection” between that jurisdiction and either the defendant or the subject matter of the action, noting at p. 1108:

... it seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties

(Underlining added)

[21] While establishing that courts can assume jurisdiction where there is a “real and substantial connection”, **Morguard** does not set out any specific factors to be considered in applying this test.

[22] In **Hunt**, a case involving a constitutional challenge to a Quebec law the purpose of which was to impede successful litigation in other jurisdictions by refusing to recognize and comply with orders of courts in those other jurisdictions (a “blocking statute”), the Supreme Court of Canada established that the assumption of jurisdiction in interprovincial cases had a constitutional dimension. The courts of a province could only constitutionally assert jurisdiction where a real and substantial connection could be established to that jurisdiction. LaForest J. made the following comments at p. 325:

In *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a “real and substantial connection” to the forum that assumed jurisdiction and gave judgment. Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction. Indeed I observed (at p. 1104) that the “real and substantial connection” test was developed in *Indyka v. Indyka*, [1969] 1 A.C. 33, in a case involving matrimonial status (where sound policy demands generosity in recognition), and that in a personal action a nexus may need to be sought between the subject-matter and the territory where the action is brought. I then considered the test developed in *Moran v. Pyle*, *supra*, for products liability cases as an example of where jurisdiction would be properly assumed. 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...

(Underlining added)

[23] Later in that case LaForest J. stated that “... the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections”.

[24] In **Tolofsen v. Jensen**, [1994] 3 S.C.R. 1022, the Supreme Court of Canada held that the choice of law in tort should be governed by the place of the tort or the *lex loci delicti*. In that case, LaForest J. noted, at p. 1049:

To prevent overreaching, however, courts 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; see *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Morguard*, *supra*; and *Hunt*, *supra*. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest.

(Underlining added)

[25] More recently, the Ontario Court of Appeal concisely summarized the development of the “real and substantial connection test” in **Van Breda v. Village Resorts Ltd.**, 2010 ONCA 84, [leave to appeal to the Supreme Court of Canada granted]:

[42] ... In *Beals v. Saldhana*, [2003] 3 S.C.R. 416, the Supreme Court held that the real and substantial connection test also applied to the recognition and enforcement of foreign judgments... *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CanLII 124 (S.C.C.), [1993] 1 S.C.R. 897, elaborated the doctrine of *forum non conveniens*, the discretionary power of the courts to decline to exercise jurisdiction where the case is more appropriately dealt with in another jurisdiction.

[43] As we noted in *Muscutt*, at paras. 36-37, in these cases, the Supreme Court of Canada described the real and substantial connection test in deliberately general language to allow for flexibility in its application. In *Tolofson*, at p. 1049, the Court described a real and substantial connection as “a term not yet fully defined”. In *Hunt*, at p. 325, the Court observed that *Morguard* had not defined “[t]he exact limits of what constitutes a reasonable assumption of jurisdiction” and added that “no test can perhaps ever be rigidly applied” as “no court has ever been able to anticipate” all the possible circumstances. The Court added that the real and substantial connection test “was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction” and that “the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections”. To the same effect is the more recent decision in *Pro-Swing v. Elta Golf Inc.* 2006 SCC 52 (CanLII), [2006] 2 S.C.R. 612, at para. 21, stating that the real and substantial connection test “is flexible and its formulation has allowed it to be applied to various evolving circumstances.” See also *Castillo v. Castillo*, 2005 SCC 83 (CanLII), [2005] 3 S.C.R. 870, at para. 45, per Bastarache J. [in minority concurring reasons]:

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

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

[45] However, the need for order and predictability necessarily imposes limits on flexibility and an important feature of *Morguard*, *Hunt* and *Tolofson* was the insistence upon jurisdictional restraint and order as well as fairness. ...

(Underlining added)

- ***Giving Context to the Real and Substantial Connection Test: Muscutt***

[26] Justice LaForest's comments in **Hunt** that "no test can perhaps ever be rigidly applied" as "no court has ever been able to anticipate" all the possible circumstances remain applicable. The **Morguard** "real and substantial connection" test has been around for twenty years with debate persisting over the applicable considerations.

[27] Perhaps the most notable attempt to provide some context to the "real and substantial connection" test was **Muscutt**. This case set out a list of non-exhaustive factors a court should consider in determining whether the test has been satisfied. The eight factors are:

- 1) the connection between the forum and the plaintiff's claim;
- 2) the connection between the forum and the defendants;
- 3) unfairness to the defendants in assuming jurisdiction;
- 4) unfairness to the plaintiff in not assuming jurisdiction;
- 5) the involvement of other parties in the suit;
- 6) the court's willingness to recognize and enforce a foreign judgment rendered on the same jurisdictional basis;
- 7) whether the case is inter-provincial or international in nature; and
- 8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[28] The applications judge noted at para. 8 of his decision that the **Muscutt** analysis has previously been applied by courts in this Province, although it has never been endorsed by this Court. The issue was discussed in **Universal Helicopters Newfoundland Ltd. v. Rolls Royce Corp.**, 2009 NLCA 58, where Cameron J.A. remarked:

[18] **Morguard** marked the beginning of the use in Canada of the real and substantial connection test to determine whether a court had jurisdiction. In that case, it was said that the real and substantial connection looked to determine whether there was some significant nexus between the forum and the action. While **Morguard** was concerned with the enforcement of a foreign judgment the same test would be applied for determination of jurisdiction over the defendant.

The Supreme Court of Canada has suggested that exact limits of real and substantial connection should not be defined (**Hunt**, pp 325-326). The Court emphasized that the principles of order and fairness were to be the guides. The Ontario Court of Appeal, however, in **Muscutt** developed a list, albeit a non-exhaustive list, of factors which should be considered in determining jurisdiction *simpliciter*. This is not the place for an analysis of the **Muscutt** approach. It is sufficient to say that it has been widely used in Ontario and other jurisdictions. However, there has also been criticism of the list as bringing the jurisdiction analysis too close to the *forum conveniens* analysis. As the Trial Division judge has noted, this Court has not yet considered whether the **Muscutt** factors should be applied in this Province.

[29] The concern that the **Muscutt** test brings the jurisdictional analysis too close to the *forum conveniens* analysis is not the only criticism that has been raised. The major criticisms of the **Muscutt** factors were summarized at para. 56 of **Van Breda**:

These concerns may be summarized as follows:

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

[30] The Ontario Court of Appeal continued at para. 57, stating:

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

- 1) the eight-part *Muscutt* test is consistent with the overriding principles of order *and* fairness laid out by the Supreme Court of Canada in *Morguard* and *Hunt* and no Supreme Court of Canada jurisprudence has called *Muscutt* into question;
- 2) the real and substantial connection test, as interpreted in *Muscutt*, properly balances fairness to the plaintiff against fairness to the defendant, as required by *Morguard*;
- 3) the criticism that *Muscutt* leaves too much discretion to the motion judge and yields unpredictable results is unjustified. Given the range and diversity of cases that come before the courts, the search for certainty is illusory and some degree of uncertainty is unavoidable unless we were to adopt an inflexible, “bright line” test, like the “place of acting” theory rejected 35 years ago: see *Moran*;
- 4) moving some of the *Muscutt* factors out of “real and substantial connection” and into *forum non conveniens* would lead to more, not less, discretion and uncertainty because *forum non conveniens* is explicitly more discretionary than the test for jurisdiction *simpliciter*.

[31] Despite the criticism of the **Muscutt** analysis and in particular the relevance of “fairness” as an independent factor, the approach in that case was recently adopted by the Nova Scotia Court of Appeal in **Penney (Litigation Guardian of) v. Bouch**, 2009 NSCA 80 (motion for reconsideration of the application for leave to appeal, dismissed at 2010 CarswellNS 773 (SCC)). The Nova Scotia court also held that the introduction of the **Court Jurisdiction and Proceedings Transfer Act**, S.N.S. 2003, c. 2, merely codified the common law.

[32] I do not agree with the approach taken in **Muscutt** and **Penney**. I prefer the test as formulated in **Coutu v. Gauthier (Succession de)**, 2006 NBCA 16 and in **Stanway v. Wyeth Canada Inc.**, 2009 BCCA 592 (leave to appeal to the Supreme Court of Canada denied). In **Stanway** the British Columbia Court of Appeal held that with the introduction of the **Court Jurisdiction and Proceedings Transfer Act**, “any reliance on the *Muscutt* factors as a guide to determining the question of jurisdiction came to an end in British Columbia ...” (para. 73).

[33] These cases establish that considerations of order and fairness are subsumed in the real and substantial test and thus “fairness” need not be considered independently.

[34] I take the same view as Tanya Monestier in “A Real and Substantial Mess: The Law of Jurisdiction in Canada” (2007), 33 Queen’s L.J. 179 at 184-186, where she stated:

It is doubtful, however, that the Supreme Court envisaged a real and substantial connection test wherein the "connection" aspect was largely ancillary to the jurisdictional analysis. The Court in *Morguard* endorsed an approach to jurisdiction that focused on the real and substantial connection between the provincial forum and either the defendant or the subject matter of the action more broadly. In *Beals*, the Supreme Court confirmed that "[a] substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action." [footnote omitted]

Both *Morguard* and *Beals* contemplated that the real and substantial connection inquiry would ultimately be guided by connections--whether such a connection was to the defendant or to the subject matter of the action. The Court in *Morguard* said that the test was meant to "afford ... some protection [to defendants] against being pursued in jurisdictions having little or no connection with the transaction or the parties." [footnote omitted] By insisting on a connection that is "a substantial one," in the sense that it is not "fleeting or relatively unimportant," [footnote omitted] the Court intended to ensure that jurisdictional determinations would be made in a principled manner. Where the necessary real and substantial connection is present, it is not unfair to require a defendant to defend an action wherever brought. The real and substantial connection test was thus the vehicle through which jurisdictional determinations would achieve the goals of order and fairness.

Understood in this manner, it is contrary to the very foundation of the real and substantial connection test for courts to independently consider factors such as fairness to the individual litigants in evaluating jurisdiction *simpliciter*. In the words of the New Brunswick Court of Appeal in *Succession de feu André Gauthier v. Coutu*:

Order and fairness are the considerations that come into play in settling jurisdiction *simpliciter* disputes that arise in circumstances where the defendant has been served *ex juris*. Those considerations are guiding principles. They are given practical effect through the real and substantial test adopted by the Supreme Court of Canada. Except in the most unusual case, the principles of order and fairness are given substance and are respected whenever the real and substantial test, correctly understood (it is concerned with more than a minor

connection), is judicially applied. Thus, with respect to factor (3) (unfairness to the defendant in assuming jurisdiction), in particular, I can only say that its inclusion as a factor, alongside the connection between the plaintiff's claim and the forum, seems at odds with the fundamental premise of the real and substantial connection test, namely that "if the necessary connection [with the subject matter of the action] is present, it is no injustice to the defendant to be forced to defend the claim in the country where it is brought." [Footnote omitted]

As the court in *Coutu* correctly observed, "fairness" was not intended to be grafted onto the real and substantial connection framework as an additional variable in the jurisdiction *simpliciter* analysis. [footnote omitted] Rather, fairness results where courts assume jurisdiction in properly restrained circumstances—that is, where the required factual connection between the province and the action is present.

[35] Some commentators disagree with this position. Notably, in Black and Brechtel, “*Muscutt v. Courcelles Revisited: The Court of Appeal for Ontario Takes Another Look*” (2009) 36 Adv. Q. 35-56, at pp. 40-41 the authors stated:

However, the better reading of [*Morguard*] is that the [real and substantial connection] test was intended to shape the inquiry into the more fundamental principles of order and fairness, it was not intended to preclude direct and independent evaluation of such values. Both *Morguard* and subsequent Supreme Court cases support this view. In *Morguard*, where LaForest J. presented the [real and substantial connection] test, he started his analysis by considering the decision of Dickson J. in *Moran v. Pyle National (Canada) Ltd.*, which does not suggest a narrow approach. There, Dickson J. had looked to English jurisprudence as a template for the [real and substantial connection] test. In doing so he appears to have accepted that the [real and substantial connection] test was a restatement of the “inherently reasonable” test. As LaForest J. observed, Dickson J.

adopted “a more flexible, qualitative and quantitative test”, posing the question, as had some English cases there cited, in terms of whether it was “inherently reasonable” for the action to be brought in a particular jurisdiction, or whether, to adopt another expression, there was a “real and substantial connection” between the jurisdiction and the wrongdoing.

If the phrase “real and substantial connection” is just a way of restating reasonableness, it can hardly be intended to subordinate a direct inquiry into reasonableness and fairness.

[36] While this argument is forceful, I do not accept it. In **Moran**, a situs of the tort case, it is clear that Dickson J. was assessing the geographical connection the elements of a tort had with a given jurisdiction. He found that it was “inherently reasonable” to bring an action in Saskatchewan in that case because there was a significant factual connection to that jurisdiction: the damages, an essential element of the tort, had been suffered exclusively in that province. The inherent reasonableness of the assumption of jurisdiction can only be sustained where the geographical facts demonstrate a substantial connection between either the defendants or the transaction and the jurisdiction. This accords with the parties’ expectations that they will not be brought before the courts of a jurisdiction which has no connection to the defendants or the transaction between the parties.

[37] Furthermore, an analysis of only the connections between the forum and the defendants or the transaction does not preclude consideration of fairness, for such consideration is inherent in the connections analysis. Courts should be conscious of the fact that the analysis should lead to a fair result. This, however, does not imply that “fairness” should be an independent factor that should be weighed against the connections analysis, as was suggested in **Muscutt**. While the evaluation of “fairness” will, in this sense, merely be confirmatory, it is worthwhile for courts to be mindful that this is the goal of the connections analysis.

- ***Refining Muscutt: Van Breda***

[38] The Court of Appeal in Ontario has since adopted a similar tack and has itself partially resiled from the position it took in **Muscutt**. In **Van Breda**, the Court of Appeal sat a five member panel to reconsider the **Muscutt** factors. With respect to factors three and four of the **Muscutt** analysis (unfairness to the defendant in assuming jurisdiction and unfairness to the plaintiff in not assuming jurisdiction, respectively), the Court of Appeal held, at para. 98 that these should serve as “an analytical tool to assess the relevance, quality and strength of those connections, whether they amount to a real and substantial connection, and whether assuming jurisdiction accords with the principle of order and fairness”. The court also held that fairness concerns should not trump weak connections.

[39] With respect to factor five from **Muscutt** (the involvement of other parties to the suit), the court in **Van Breda** stated that: “[this factor] is not a factor that needs to be routinely considered in all cases. It remains relevant to the real and substantial connection test, but only in cases where it is

asserted as a possible (not a presumptive) connecting factor that may justify assuming jurisdiction”. I agree with this statement.

[40] The Ontario Court of Appeal in **Van Breda** also relegated considerations of comity, or “general principles” (factors 6-8) to the status of “analytical tools”. I would go further and state that, while these considerations are not irrelevant, they need not be explicitly considered in the jurisdictional analysis. The focus of the real and substantial connection test is on the factual nexus between the jurisdiction and the action or the defendant.

[41] The **Van Breda** reformulation of the **Muscutt** test has itself been criticized (see Tanya Monestier, “A Real and Substantial” Improvement? Van Breda Reformulates the Law of Jurisdiction in Ontario” in Todd L. Archibald and Randall Scott Echlin, ed., *Annual Review of Civil Litigation* (Toronto, Carswell, 2010) at 185). The concern is that the inclusion of “fairness” and “general principles” as “analytical tools” confuses the analysis. LeBlanc J. in **Cougar Helicopter Inc. v. Sikorsky Aircraft Corporation**, 2010 NLTD (G) 213 commented that the difference between the inclusion of fairness as an analytical factor or its total exclusion as an independent factor “may be more suspect than real”.

[42] In my view, fairness should permeate the connections analysis; it should be considered when assessing the strength, quality and relevance of the connections themselves. I believe this is what Justice LaForest was referring to in **Hunt** when he said that “the assumption of and discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections”. In other words, while the test must ultimately look at the geographical connections the defendant and the transaction have to the jurisdiction, it is the quality, not the quantity, of those connections that matters.

- ***Exceptions to the requirement that there be a real and substantial connection to the jurisdiction***

[43] As noted above, the Supreme Court of Canada held in **Morguard** that the grounds for assuming jurisdiction should be re-formulated to satisfy the underlying rationales of private international law, namely order and fairness.

[44] Based on my interpretation of **Morguard** and **Hunt**, it appears that the requirement that a court establish that there is a real and substantial

connection to the jurisdiction ousts any independent considerations of fairness. Although this may perhaps increase the predictability of the analysis, I do not believe that the complete elimination of such considerations is a desirable outcome.

[45] The Ontario Court of Appeal, in **Van Breda**, noted that this result is attenuated if exceptions to the rule may be made for exceptional cases. Specifically, it points to the forum of necessity doctrine, stating:

[100] The post-*Muscutt* emergence of the forum of necessity doctrine has a direct bearing on this issue. The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace “forum of last resort” cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.

[46] It may be desirable to leave open the possibility of establishing new, discrete categories for the assertion of jurisdiction in exceptional cases where order, fairness and access to justice require it, such as the newly developing forum of necessity doctrine.

[47] Any exceptions that would allow for the assertion of jurisdiction where the real and substantial connection test has not been met, however, would be “fragile from a constitutional point of view” (Tanya Monestier, “A ‘Real and Substantial Improvement? *Van Breda* Reformulates the Law of Jurisdiction in Ontario”, *Supra*, at 217) and would involve the court accepting that “the Constitution does not constrain it from exercising discretion to serve as a forum of necessity” (Janet Walker, “*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada” (2009) 48 Can. Bus. L.J. 135 at 137). Since the creation of such an exception was not argued in this case, this Court will not further consider the appropriateness of doing so.

- ***Category Based Presumptions***

[48] Another important aspect of the **Van Breda** decision was its adoption of “category based presumptions”. If a plaintiff can demonstrate the existence of any of the circumstances enumerated in Rule 17.02 (service *ex juris*) of the Ontario **Rules of Civil Procedure** (with the exception of Rule 17.02(H) and (O)), a real and substantial connection is presumed. A real and substantial connection may also be established by a plaintiff in the absence of any of the factors. A defendant may also rebut the presumption created by the existence of one of those factors.

[49] This approach follows the model **Court Jurisdiction and Proceedings Transfer Act** which was developed by the Uniform Law Conference of Canada and has been adopted by Saskatchewan, Yukon Territory, Nova Scotia and British Columbia.

[50] Significantly, the presumption is not raised where the plaintiff has suffered damages in Ontario (Rule 17.02(H)) or where the defendant is a necessary or proper party to an action (17.02(O)).

[51] With minor exceptions, Newfoundland and Labrador Rule 6.07(1), which sets out circumstances under which service *ex juris* is permitted without leave of the court, is substantially the same as Ontario Rule 17.02.

[52] It is not necessary to go as far as creating a presumption that a real and substantial connection exists where one of those situations is found to exist. Those circumstances will, however, be strong *indicia* that a real and substantial connection does exist, with the onus remaining on the plaintiff to establish that the real and substantial connection test is satisfied where the assertion is challenged by the defendant.

- ***Summary***

[53] The applicable principles may be summarized:

- (1) Jurisdiction can be assumed where there is a real and substantial connection between the jurisdiction and the subject matter of the action or the defendant;
- (2) In assessing whether jurisdiction is engaged a real and substantial connection can be demonstrated where the strength, relevance and quality of the connections between the jurisdiction and the subject

matter of the action or the defendant make it fair to the defendant to assume jurisdiction;

- (3) Fairness to both parties is the goal of the analysis, but it does not form an independent factor which must be considered, nor does it trump weak connecting factors; and
- (4) The circumstances listed in Rule 6.07(1) are strong *indicia* of a real and substantial connection, but do not create a presumption that the test has been satisfied.

- ***Application to the Facts***

[54] The geographical facts in this case were straight forward and the findings of fact by the trial judge were not challenged on appeal. Fewer did urge, however, that this Court could find that the real and substantial connection test was satisfied.

[55] The geographical facts in the tort action, as found by the applications judge, were:

- (1) The assault is alleged to have happened in Manitoba. The location of the alleged acts of negligence by all defendants is Manitoba.
- (2) The appellant asserts that he suffered injuries to his left arm. The evidence was that he sought treatment at the Tadoule Lake Nursing Station, in Manitoba, on February 20, 2008.
- (3) On February 26, 2008 he was seen by an orthopedic surgeon at the Eastern Health Facilities in St. John's, Newfoundland and Labrador, allegedly for injuries sustained in the assault. He was referred to physiotherapy for pain relief, strengthening and range of motion exercises, all related to his left shoulder. However, Fewer returned to Tadoule Lake soon thereafter and did not receive any physiotherapy in either this Province or in Manitoba.
- (4) There is no evidence of continuing physical injury or loss that involved medical or other treatment facilities of the Province of Newfoundland and Labrador.

[56] The connection between either Ellis and the other respondents or the tort action and this jurisdiction is tenuous at best. The only connection

between the claim and this jurisdiction is the fact that Fewer had one medical consultation in this jurisdiction for his alleged injuries. The significance of this connection, in light of that fact, is minimal.

[57] Fewer relies heavily on **Moran** to support his position. The cases are distinguishable. **Moran** was a product liability case where the plaintiff had suffered damages in his home jurisdiction as a result of using a product that was sold in the same jurisdiction. The case on appeal is more analogous to the situation referred to in **Van Breda** at para. 91, where the court stated:

[T]he fact that it was foreseeable that a visiting plaintiff will return home and continue to suffer damages from the injury does not, by itself, make the defendant subject to the plaintiff's home jurisdiction under the *Moran* principle.

I agree with that statement of the law. If courts could assume jurisdiction in such circumstances, the risk of forum shopping is clear. It would be unfair to subject a defendant to a legal system with different rules (longer limitation periods, the existence of presumed damages, etc.) merely because a plaintiff chose to move there to recuperate.

[58] I therefore agree with the applications judge that the real and substantial connection test was not satisfied in the tort action.

[59] The geographical facts in the contract action, as found by the applications judge, were:

- (1) The contracts pleaded by Fewer relate to his work at the Tadoule Lake school, in the Province of Manitoba.
- (2) The contracts asserted in the statement of claim clearly contemplate performance in and only in Manitoba.
- (3) Fewer's obligations under these contracts were performed wholly in Manitoba, but that he has not yet been paid in full.

[60] I agree with the applications judge's finding at paragraph 4 of the second decision that "the fundamental subject matter of the action relates to the performance or non-performance of contracts in Manitoba." Based on the same analysis applied in relation to the tort action, the real and substantial connection test has not been satisfied in the contract action, and the trial judge correctly found that the court did not have territorial jurisdiction to entertain the claim.

- (3) ***Did the applications judge err in law and wrongly apply the established conflicts of law procedure and specifically fail to adjudicate that if the Province of Newfoundland and Labrador was an inappropriate forum, there was clearly an appropriate forum, which the respondents were not opposing, being the Province of Manitoba, for “the pursuit of the action and securing the ends of justice”?***

[61] Fewer listed this ground of appeal in his factum, but, as set out above, this assertion is wrong in law. The jurisdiction *simpliciter* analysis must precede the determination of which forum is the most appropriate or convenient. If a court determines it does not have jurisdiction *simpliciter*, it does not need to go on to determine if another forum would be more appropriate.

[62] In any event, the Sayisi Dene respondents conceded that Manitoba would be an appropriate forum.

- (4) ***Did the applications judge err in law in failing to find that if the matter did not have a real and substantial connection to the Province of Newfoundland and Labrador, the appropriate ruling would have been to allow the appellant to prosecute his claim in the Province of Manitoba?***

[63] In argument, Fewer appeared to have abandoned this ground of appeal, recognizing that this Court could not make an order binding on the Manitoba courts. On questioning, Fewer’s counsel clarified that what he sought was actually a stay of proceedings. Fewer’s argument was that a “live” action in this Province might provide a “lifeline” which a Manitoba court could potentially use to establish that Fewer had initiated his claim in Manitoba within the limitation period applicable there.

[64] The parties appeared to be proceeding on the basis that, if the transfer of the action to Manitoba was possible, a stay of proceedings would be the appropriate remedy.

[65] The Sayisi Dene respondents sought to have the service of the statement of claim set aside and the proceedings stayed. They did not seek a dismissal of the action. Fewer argues it would be manifestly unfair to grant relief that the Sayisi Dene respondents did not request in their application,

particularly where the result, in Fewer's view, is to foreclose his right to have the action adjudicated on the merits.

[66] With respect, even if the transfer of the proceedings to Manitoba was possible, this is not the issue. I am satisfied that, if this Court has jurisdiction to enter a stay of proceedings, that would be the appropriate remedy. This is the remedy the Sayisi Dene respondents sought in their application. Rule 29.02(1) provides:

29.01(1) An application shall set forth ... any relief or order claimed ...

[67] The issue, therefore, is whether this Court may grant a stay of proceedings in the present circumstances.

(5) ***Did the applications judge err in law in dismissing the appellant's statement of claim when the remedy sought by the respondents' application was a stay of proceedings?***

[68] Fewer did not point to any authority for this assertion. The trial judge, in his reasons, cited **Coutu**. In that case the Chief Justice of New Brunswick stated:

[55] Moreover, and just as importantly, while both Rules 19.05(1) and 23.01(2), read literally, would appear to invest the court with power to stay an action over which it has no jurisdiction, it is clear that the appropriate order in that circumstance is not a stay, but a dismissal of the action (see **Castel, Canadian Conflict of Laws**, 4th ed., Toronto: Butterworths 1997 at p. 55, footnote 25)

I agree with this result.

[69] The problem with issuing a stay of proceedings is that a court cannot provide a remedy that it has no jurisdiction to issue. The Court's inherent authority to order a stay is codified in subsection 97(1) of the **Judicature Act**, RSNL 1990, c. J-4. That subsection provides:

97(1) The Court may direct a stay of proceedings pending before it.

(Underlining added)

[70] It is clear from a reading of this subsection that, in order to direct a stay of proceedings, the proceedings must be pending before the Court. Where a court lacks jurisdiction *simpliciter*, the proceedings are not properly pending before the Court. The plaintiff cannot invoke the Court's

jurisdiction for the purpose of obtaining a stay when the matter is not properly before it. For this reason, the applications judge correctly determined that he could not issue the requested order. He properly dismissed the actions as a dismissal was the only remedy available in the circumstances.

CONCLUSION

[71] For these reasons, I would dismiss the appeal and confirm the orders of the applications judge, in the first decision and the second decision, dismissing the actions and awarding costs as set out in his respective orders. Costs on the appeal are awarded to the Sayisi Dene respondents on a party and party basis.

C.W. White, J.A.

I concur:

M.F. Harrington, J.A.

I concur:

L.R. Hoegg, J.A.