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reasonableness standard of review

When parties to a private commercial arbitration explicitly contract out of rights of appeal, is it open to them to seek judicial review of the merits of the arbitrator's decision on the basis that it is unreasonable? Prior to the decision of the Ontario Court of Appeal in *Smyth v. Perth and Smith Falls District Hospital*, it seemed clear that this avenue of review was simply not available. The *Arbitration Act, 1991* contemplates court intervention only on enumerated grounds – and judicial review on the merits is not one of those grounds. However, as Rebecca Burrows explains, in *Smyth*, the Court of Appeal considered the arbitrator's decision against the reasonableness standard introduced by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*. The Court of Appeal did so without expressly addressing whether it had jurisdiction to intervene on that basis. In the result, it seems that *Smyth* may have opened the door to judicial review of arbitral awards for reasonableness, even where the parties have contracted out of all rights of appeal. The better view, however, given the statutory framework and the well-established line of authorities, is that the door remains closed in private law cases. 790

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Rahim Punjani and Christina Porretta examine the legal framework for identifying new situations in which Canadian courts will assume jurisdiction over an out-of-province defendant. In Canada, there are three ways in which a court of a province can establish jurisdiction over an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. The *Uniform Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") is a model law drafted by the Uniform Law Conference of Canada in the 1990s to govern matters of extra-provincial jurisdiction. The CJPTA has been adopted and is in force in British Columbia, Saskatchewan and Nova Scotia. It contains, among other things, a list of presumptive connecting factors, which, if established, give rise to a presumption that jurisdiction can be assumed. The authors note that courts in those provinces that have not enacted the CJPTA are bound to follow the Supreme Court of Canada's recent decision in *Club Resorts Ltd. v. Van Breda*, which provides guidance on when a court should assume jurisdiction based on a "real and substantial connection" at common law. 796

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PRIVATE COMMERCIAL ARBITRATION

Reasonableness Standard of Review: What Is its Proper Place in a Commercial Arbitration Context?

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When parties to a private commercial arbitration explicitly contract out of rights of appeal, is it open to them to seek judicial review of the merits of the arbitrator's decision on the basis that it is unreasonable? Prior to the decision of the Ontario Court of Appeal in *Smyth v. Perth and Smith Falls District Hospital*,[1] it seemed clear that this avenue of review was simply not available. The *Arbitration Act, 1991* contemplates court intervention only on enumerated grounds – and judicial review on the merits is not one of those grounds. Yet, in *Smyth*, the Court of Appeal considered the arbitrator's decision against the reasonableness standard introduced by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*.[2] The Court of Appeal did so without expressly addressing whether it had jurisdiction to intervene on that basis. In the result, it seems that *Smyth* may have opened the door to judicial review of arbitral awards for reasonableness, even where the parties have contracted out of all rights of appeal. The better view, however, given the statutory framework and the well-established line of authorities, described below, is that the door remains closed in private law cases.

The Decisions in Dunsmuir and Smyth

Dunsmuir involved the judicial review of an adjudicator's decision in respect of a grievance brought by an employee under the *Public Service Labour Relations Act*. In that context, the Supreme Court of Canada re-examined the traditional, but "difficult to implement" approach to judicial review of administrative decisions, and developed a new "principled" framework that is "more coherent and workable." That framework contemplates two standards of review for administrative decisions, namely reasonableness and correctness. The Court defined those two concepts, and provided a framework for determining the appropriate standard of review. The Court held that statutory tribunals must be correct in their determination of questions of jurisdiction and of some other questions of law. When reviewing other aspects of decisions for reasonableness, the court is to inquire into "the qualities that make a decision reasonable, referring to both the process of articulating the reasons and to outcomes." In judicial review, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."

Notably, *Dunsmuir* did not involve any specific consideration of the standard of review to be applied to a decision made in the context of a private commercial arbitration, with or without a right of appeal, let alone any consideration of the circumstances under which a court even had that power to intervene.

The Court of Appeal's decision in *Smyth* was rendered shortly after the decision in *Dunsmuir*. In *Smyth*, a doctor applied for staff reappointment to a hospital pursuant to the provisions of the *Public Hospital Act* ("PHA"). The PHA required the hospital to consider the recommendation of its Medical Advisory Committee ("MAC") prior to deciding whether to grant or refuse the application for reappointment. The hospital was not bound by the MAC's recommendation. The MAC recommended against the doctor's application for reappointment. The hospital, doctor and the MAC then voluntarily submitted certain disputes to arbitration. The arbitrator ruled that the doctor should be permitted to resign, or be terminated. The doctor brought an application to set aside that

[1] 2008 ONCA 794 (CanLII) ["*Smyth*"].
[2] 2008 SCC 9 (CanLII) ["*Dunsmuir*"].

decision pursuant to section 46(1)(6) of the *Arbitration Act, 1991* on the basis that the award dealt with a dispute that the arbitration agreement did not cover. The applications judge found that the arbitrator was incorrect to have made the order that he did, and set aside the award for lack of jurisdiction.

On appeal, the Court of Appeal stated that "by parity of reasoning" the *Dunsmuir* correctness standard applied to decisions of arbitrators on questions of jurisdiction. The Court found that the arbitrator had correctly assumed jurisdiction, and thus overturned the applications judge. The Court of Appeal then stated "... the only remaining question is whether the award is reasonable." Applying the *Dunsmuir* reasonableness standard, the Court held that "the arbitrator's decision was clearly reasonable within these parameters."

While the Court of Appeal certainly entertained the possibility of setting aside the award had it viewed the decision to be unreasonable, there is no explanation in the decision for the basis of the Court's belief that it had the jurisdiction to do so. The decision in *Smyth* simply begs the question – given the statutory framework of the *Arbitration Act, 1991*, what was the basis for the Court's jurisdiction to have undertaken such a review?

The Limits of Court Intervention in Private Commercial Arbitration

An understanding of the proper and permitted role of the court in private commercial arbitration starts with a consideration of the governing statutes. In Ontario, international commercial arbitrations are governed by the *International Commercial Arbitration Act*, which is based on the Model Law. All other arbitrations are governed by the domestic *Arbitration Act, 1991*. Both statutes expressly limit court intervention in private arbitrations to certain enumerated grounds, which are aimed at supporting the autonomy of arbitration. Absent a specific provision of the applicable Act, the court may not interfere with an arbitrator's decision.

In the case of the *International Commercial Arbitration Act*, that direction to the court is prescribed in Articles 5, 34 and 36 of the Model Law, which is incorporated by reference into the Act. Article 5 of the Model Law directs that no court shall intervene in matters governed by the Model Law, except where so provided. The Model Law does not provide for any rights of appeal. It also expressly limits the scope for judicial intervention to an application to set aside an award for the following reasons enumerated in Article 34:[3]

> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State, or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside, or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
>
> (b) the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or
>
> (ii) the award is in conflict with the public policy of this State.

The Model Law, which has been widely adopted, reflects a combined effort on an

[3] The Model Law also permits judicial intervention to resist enforcement of an award under one or more of the grounds enumerated in Article 36, which closely mirror the grounds to set aside an award under Article 34.

international scale to provide a consistent framework within which international commercial disputes may be conducted and enforced. To that end, in the absence of one of the grounds enumerated in Article 34, Ontario courts have consistently refrained from intervening in international arbitral processes and decisions. Notably, a right of review for reasonableness of an arbitrator's decision rendered within his or her jurisdiction is not one of the grounds enabling court intervention.

The decision of the Ontario Superior Court of Justice in *Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.*[4] provides an informative overview of the principles applied by the court when considering requests to intervene in arbitrations conducted under the Model Law.[5] Those principles espouse restraint, broad deference, and respect for autonomy. They are driven by the policy underlying the clear words of the statute, namely parties to international commercial business transactions with agreements to arbitrate require, and expect, predictability in the resolution of their disputes. The decision in *STET* emphasizes that (i) an international arbitral award cannot be invalidated by the court, even if the court's view is that the arbitration was wrongly decided on a question of fact or law, and (ii) the prescribed grounds for court intervention are themselves to be narrowly construed.

The domestic *Arbitration Act, 1991* in Ontario[6] takes a similar approach in that its section 6 directs that no court shall intervene in matters governed by the Act, except for the following purposes, in accordance with the Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

The domestic Act deals with appeals in section 45, which essentially leaves it to the parties to determine any rights of appeal on questions of law, fact or mixed fact and law. The parties may agree to contract out of appeal rights entirely, or may agree to permit appeals in full or in part. Most arbitration agreements contain words to the effect that the decision of the arbitrator is "final and binding," which has been interpreted to mean no right of appeal.[7] If the arbitration agreement does not expressly exclude appeals on questions of law, then a party may appeal an award on that basis with leave of the court in certain instances.[8]

A party is not permitted to contract out of the right to seek court involvement in setting aside an arbitral award on the grounds enumerated in section 46(1) of the Act, which are as follows:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid or has ceased to exist.
3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
4. The composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act.
5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another

[4] 1999 CanLII 14819, aff'd 2000 CanLII 16840 ("*STET*").

[5] *STET* involved an application to set aside an award pursuant to Article 34 on the grounds that the arbitral tribunal was without jurisdiction in respect of three of the applicants, the applicants were denied equality of treatment and the opportunity to present their case, and the award was in conflict with public policy in Ontario.

[6] See, also, the domestic arbitration legislation in Alberta, Saskatchewan, Manitoba and Nova Scotia.

[7] See the discussion in J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2d ed. (New York: JurisNet, LLC, 2011) at 9.2.4.

[8] Pursuant to section 45, leave to appeal shall be granted by the court only if it is satisfied that, (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and (b) determination of the question of law at issue will significantly affect the rights of the parties.

party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.

7. The procedures followed in the arbitration did not comply with this Act.
8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.
9. The award was obtained by fraud.
10. The award is a family arbitration award that is not enforceable under the *Family Law Act.*

None of these grounds readily encompass any right of review for reasonableness of an arbitrator's decision rendered within his or her jurisdiction.

The judiciary's approach to requests to intervene in domestic arbitrations has been to carefully limit its intervention to the enumerated grounds. That long-standing approach was recently affirmed by the Ontario Court of Appeal in *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*[9] as follows:

> It is clear from the structure and purpose of the Act in general, and from the wording of s. 6 in particular, that judicial intervention in the arbitral process is to be strictly limited to those situations contemplated by the Act. This is in keeping with the modern approach that sees arbitration as an autonomous self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts. As Inforica states in its factum, "arbitral proceedings are presumptively immune from judicial review and oversight." The Act encourages parties to resort to arbitration, "requires them to hold to that course once they have agreed to do so" and "entrenches the primacy of arbitration over judicial proceedings ... by directing the court, generally, not to intervene": *Ontario Hydro v. Denison Mines Ltd.*, [1992] O.J. No. 2948 (Gen. Div.), Blair J.

In a similar vein, respecting the autonomy of the private law mechanism chosen by the parties, the courts have held that public law remedies, such as reviews under the *Judicial Review Procedures Act* ("JRPA"), are not available in private arbitrations. In *Adams v. Canada (Attorney General)*,[10] the Divisional Court summarized the role of the *Arbitration Act, 1991* and the case law considering requests for that court to intervene, and concluded that the Divisional Court has no jurisdiction to intervene in disputes subject to private arbitration. Parties to private disputes were directed to look to the applicable arbitration statute to determine the extent of the court's involvement and any rights of review.

The Impact of Smyth on Private Commercial Arbitrations

The decision in *Smyth* is cause for some concern. It is certainly counter-intuitive for a court to have jurisdiction to review an arbitrator's decision for reasonableness, particularly when the parties have sought finality and contracted out of any rights of appeal. Moreover, given the statutory framework for arbitrations in Ontario, the source of the Court's jurisdiction to do so is far from clear. Nonetheless, *Smyth* may have had the impact of expanding the Court's involvement by enabling an additional right of review. Given the absence of express reasons on the point, however, *Smyth* should be not assumed to have had that effect, and ought to be critically considered.

Although not referred to directly in the decision, there are circumstances in *Smyth* that may have informed the Court of Appeal's belief that it had jurisdiction to review the decision for reasonableness. For example, since the dispute was related to the re-appointment of a doctor under the PHA, the Court may have considered the arbitrator to be exercising a public administrative function subject to review on that basis.[11] Also, the fact

[9] 2009 ONCA 642 (CanLII) ["*Inforica*"].

[10] 2011 ONSC 325 (CanLII), aff'd 2011 ONSC 7592 (CanLII) ["*Adams*"].

[11] The decisions of arbitrators made under a public, as opposed to private, function, are always subject to judicial review. It is for this reason that the court's involvement in private commercial arbitrations arguably differs, and is more circumscribed, than the court's involvement in arbitrations taking place within the statutory jurisdiction of administrative tribunals. As stated by *Dunsmuir*:

> ... The rule of law requires that the constitutional role of superior courts be preserved and, as indicated, neither Parliament nor any

that *Smyth* involved an application to set aside the arbitrator's decision for want of jurisdiction under section 46(1)(3) may have come in play.

Subsequent decisions applying *Smyth* have not shed much light on the issue. For example, in the decision of *Vincent v. Vincent*,[12] the applicant sought to set aside portions of a final and binding arbitral award rendered in a private family law arbitration under the *Arbitration Act, 1991* on the basis that the arbitrator lacked jurisdiction. Alternatively, if the arbitrator had jurisdiction, the applicant asserted that the award should be set aside as unreasonable. The Ontario Superior Court of Justice applied *Smyth* and held that the arbitrator had incorrectly assumed jurisdiction. The Court set the impugned portion of the award aside on that basis. In the alternative, the Court determined that the award could be set aside as unreasonable. The *Vincent* decision refers to *Smyth* and applies the *Dunsmuir* reasonableness standard. The reasons for decision do not indicate any principled consideration of the source of the Court's jurisdiction to have undertaken the reasonableness review.

Ford Motor Co. of Canada v. Lachapelle[13] involved an application pursuant to section 46(1)(3) of the *Arbitration Act, 1991* to set aside an arbitral award made under the Canadian Motor Vehicle Arbitration Plan. The Ontario Superior Court of Justice applied *Smyth* and held that the arbitrator's assumption of jurisdiction must be correct (which it was), and the arbitrator's decision must be reasonable in the result (which it was). In that case, the Court appears to have assumed that it had jurisdiction to review the merits of the arbitral award, and determined that it should be on the *Dunsmuir* reasonableness standard. That jurisdiction does not appear to have been contested by the respondent. Instead, it seems that it was the respondent who advanced *Smyth*, emphasizing the high degree of deference afforded by the reasonableness standard and the strength of the arbitrator's decision in its case. Consequently, in dismissing the application, the Court's jurisdiction to intervene to undertake a review for reasonableness was not challenged, and, since the Court determined that the arbitral award was reasonable, the issue of whether the Court even had that jurisdiction was not directly engaged.

In *Parmalat Canada Inc. v. Ontario Teachers' Pension Plan Board*,[14] the issue of the Court's jurisdiction was placed squarely before the Court. In that case, Teachers commenced a private commercial arbitration pursuant to a Liquidity Payment Agreement ("LPA") that had been entered into with Parmalat Canada. Teachers sought a determination that a Liquidity Event had occurred within the meaning of the LPA, thus entitling Teachers to a significant sum of money. The issue in the arbitration was essentially one of contractual interpretation, and Teachers was successful in the result.

Parmalat Canada then brought an application to set aside the arbitral award on the basis that it had not been treated equally and fairly by the arbitrator as required by section 46(1)(6) of the *Arbitration Act, 1991*. Parmalat Canada also asserted that the Court was entitled to review the award under the *Dunsmuir* reasonableness standard relying on *Smyth*, and that the arbitrator's decision should be set aside on the basis that the arbitrator's interpretation of the LPA was unreasonable. In response, Teachers asserted that the arbitral process met all the requirements of fairness, and the decision of the arbitrator was entirely reasonable in the result. Teachers also resisted the Court's jurisdiction to review the arbitral award for reasonableness on the basis that to do so, would be inconsistent with the parties' agreement to preclude rights of appeal, the statutory framework, and the Court's historical regard for the autonomy of private arbitrations.

In dismissing Parmalat Canada's application to set aside the arbitral award, the Court held that the parties had been treated equally and fairly. On the issue of the review for reasonableness, the Court held that "Parmalat Canada has no right of appeal and has not challenged the Arbitrator's jurisdiction and thus has made no real basis to assert that the

legislature can completely remove the court's power to review the actions and decisions of administrative bodies. This power is constitutionally protected.

[12] [2009] O.J. No. 3586 ["*Vincent*"].

[13] 2011 ONSC 2217 (CanLII).

[14] 2012 ONSC 5981 (CanLII).

Arbitrator's finding that a "Liquidity Event" occurred within the LPA is "unreasonable." This holding suggests that the Court had its doubts as to its jurisdiction to set aside the award as unreasonable.[15]

The Proper Place for a Reasonableness Review in a Commercial Arbitration Context

The starting premise in considering court involvement in an arbitration is that the parties have voluntarily elected to proceed outside of the formal court process. They have done so within a statutory framework aimed at respecting their choice, and, if necessary, holding them to that choice. That framework specifically guarantees court involvement only insofar as expressly provided by enumerated grounds, and permits the parties to contract out entirely of appeal rights. Any case law that threatens to upset that regime should be viewed with caution. *Smyth* is one of those cases. For the reasons expressed above, it can be narrowly construed, and its circumstances and result need to be critically analyzed in any case that attempts to rely on it. Its lack of a direct or principled consideration of the jurisdiction of the court to intervene provides little guidance or precedent for future cases. Absent that consideration, the better view on the court's jurisdiction would appear to be that the court does not have the power to review an arbitrator's decision on the merits of the dispute where no appeal lies.

[15] In two other cases, *White v. Ritchie*, 2008 CanLII 67426 ["*White*"] and *Piazza Family Trust v. Veillette*, 2011 ONSC 2820 (CanLII) ["*Piazza*"], the Ontario Superior Court of Justice referred to *Smyth* for the applicable standard of review on questions of jurisdiction. In *White*, the cross-applicant also sought to have the arbitrator's decision set aside due to a denial of natural justice under sections 46(1)(6) and (7) of the *Arbitration Act, 1991*. The Court did not engage *Smyth* in its consideration of those issues. Interestingly, in *Piazza*, the applicant sought to set aside the arbitrator's decision for lack of jurisdiction under section 46(1), which relief was refused by the Ontario Superior Court of Justice. The applicant also sought a judicial review of the merits of the arbitrator's decision, but under section 2 of the JRPA, which relief was also refused for the reasons discussed in *Adams*. One might have expected that the applicant in *Piazza* would have sought relief of this nature under *Smyth*, but that does not appear to have been the case.

JURISDICTION

Establishing Jurisdiction Over an Out-of-Province Defendant

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Introduction

This article concerns the legal framework for identifying new situations in which Canadian courts will assume jurisdiction over an out-of-province defendant.

In Canada, there are three ways in which a court of a province can establish jurisdiction over an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction.[1] Presence-based jurisdiction permits a court to have jurisdiction over an out-of-province defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an out-of-province defendant who consents to the jurisdiction of the domestic court. Assumed jurisdiction arises when the court takes jurisdiction because the litigation involving the out-of-province defendant has a "real and substantial connection" to the province.[2] It is this third factor which will be the focus of this article.

The *Uniform Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") is a model law drafted by the Uniform Law Conference of Canada in the 1990s to govern matters of extra-provincial jurisdiction. The CJPTA has been adopted and is in force in British Columbia, Saskatchewan and Nova Scotia.[3] It contains, among other things, a list of presumptive connecting factors,[4] which, if established, give rise to a presumption that jurisdiction can be assumed. The onus is then on the defendant to rebut the existence of the presumptive connecting factor.

Courts in those provinces that have not enacted the CJPTA are bound to follow the Supreme Court of Canada's recent decision in *Club Resorts Ltd. v. Van Breda*,[5] which provides guidance on when a court should assume jurisdiction based on a "real and substantial connection" at common law. In that case, Justice LeBel referred to the CJPTA as a model for the presumptive connecting factor approach to establishing a real and substantial connection, and essentially imported the CJPTA framework, with some modification, into the common law test.[6]

Since the test for assumed jurisdiction in *Club Resorts* is a common law test, it is not binding on those jurisdictions where the CJPTA is in force. Notwithstanding the separate common law and statutory regimes that provide guidance on the interpretation of "real and substantial connection," the regimes are interrelated and will inevitably influence each other. One situation where such influence may play a role is where courts in either jurisdiction are faced with a situation where no presumptive connecting factor exists. It is clear from both *Club Resorts* and the CJPTA that the enumerated list of presumptive connecting factors is not exhaustive, and thus, there may be circumstances that warrant the creation of a new connecting factor. Although Justice LeBel in *Club Resorts* set out a framework for how to establish new connecting factors in the common law, no such guidance exists in the CJPTA. Accordingly, this article will explore the relationship between the two regimes with respect to the approach taken when, *prima facie*, no presumptive connecting factor exists.

[1] *Muscutt v. Courcelles*, 2002 CarswellOnt 1756 at paragraph 19 (O.N.C.A.) ["*Muscutt*"].

[2] *Misyura v. Walton*, 2012 CarswellOnt 11846 at paragraph 21 (O.N.S.C.) ["*Misyura*"].

[3] S.B.C. 2003, c. 28 ["B.C. CJPTA"]; S.S. 1997, c. C-41.1 ["Sask. CJPTA"]; and S.N.S. 2003 (2d Sess.), c. 2 ["N.S. CJPTA"] (collectively, the "CJPTA Courts"). The Yukon Territory has also adopted a version of the CJPTA; however, it is not yet in force in that jurisdiction.

[4] In particular, see section 10 of the B.C. CJPTA; section 9 of the Sask. CJPTA; and section 11 of the N.S. CJPTA.

[5] 2012 SCC 17, 2012 CarswellOnt. 4268 ["*Club Resorts*"].

[6] Ibid. at paragraphs 75-76.

The CJPTA Presumptive Factors

The CJPTA establishes rules to determine when a court will have "territorial competence" (jurisdiction *simpliciter*), one rule being where there is a real and substantial connection between forum and the facts on which the proceeding against that person is based.[7] The CJPTA provides that a presumption of a real and substantial connection exists in twelve specified circumstances. The plaintiff will be able to rely on one or more of the enumerated presumptions in that section, which are all rebuttable by the defendant.

The CJPTA list was derived from the categories of cases in which most provinces' rules of court have allowed service on a non-resident defendant without leave.[8] The list is not exhaustive. CJPTA courts have proceeded on the basis that a real and substantial connection could still exist (where none of the enumerated presumptive factors are met) based on the former common law test in *Muscutt*,[9] although the statute does not provide any guidance for this.

Club Resorts Presumptive Factors

The Supreme Court of Canada in *Club Resorts* recently provided a similar approach in regards to when a court should assume jurisdiction. It adopted into the common law the mechanism used in the CJPTA and set out an analytical framework based on the presence of presumptive connecting factors for assuming jurisdiction in tort claims. The reformulation of the real and substantial connection test was informed by the approach taken in the CJPTA, as well as the view that the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up on a case-by-case basis.[10] Rather, Justice LeBel held that the assumption of jurisdiction must be established on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum, while promoting stability and predictability under this branch of the law of conflicts.[11]

Justice LeBel listed four circumstances where the court could presumptively assume jurisdiction in tort cases. The presumptive connecting factors are: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province.[12] The presumptive factors only relate to tort actions, unlike the factors listed in the CJPTA, which relate to all types of causes of actions (i.e., contractual and restitutionary claims). However, the list of presumptive factors is not closed, since Justice LeBel held that over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction.[13]

Identifying New Connecting Factors

Justice LeBel went on to provide guidance on how courts in following *Club Resorts* should identify new presumptive factors, with the caveat that any new factor cannot be "*ad hoc*" and jurisdiction should not be assumed in a discretionary manner on a case-by-case basis.[14] Rather, the rationale for reformulating the common law real and substantial connection test was to engender stability and predictability in this branch of the law of conflicts.[15] Accordingly, a court identifying new presumptive connecting factors must bear this in mind; otherwise there is a risk that the selection of new presumptive factors will lead to the result where jurisdiction is based "on an exercise of almost pure and individualized judicial discretion."[16]

In identifying new presumptive factors, the focus is on the connections that give rise to a

[7] Under the CJPTA, territorial competence is established where (a) the party is a plaintiff by counterclaim in another proceeding in the B.C. court; (b) the person by conduct submits to the B.C. court's jurisdiction; (c) the person enters into an agreement with the plaintiff that the B.C. court has jurisdiction in the proceeding; (d) the person is ordinarily resident in B.C. at the time of the commencement of the proceeding; and (e) there is a real and substantial connection between B.C. and the facts on which the proceeding against that person is based.

[8] Joost Bloom, "Canadian Cases in Private International Law in 2010" (2010) 48 *Can. Y.B. Int'l L.* at 530.

[9] Supra note 1.

[10] Supra note 5 at paragraph 73.

[11] Ibid. at paragraph 82.

[12] Ibid. at paragraph 90.

[13] Ibid. at paragraph 91.

[14] Ibid. at paragraph 93.

[15] Ibid. at paragraph 75.

[16] Ibid.

relationship with the forum that is similar in nature to the existing four presumptive connecting factors. The relevant considerations listed by Justice LeBel are:

(a) similarity of the connecting factor with the recognized presumptive connecting factors;

(b) treatment of the connecting factor in the case law;

(c) treatment of the connecting factor in statute law; and

(d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.[17]

Since the emergence of this common law framework a little over a year ago, there has been at least one decision in Alberta that has extended the common law list of connecting factors in a breach of contract case.[18] There have been no reported decisions in Ontario that have extended the common law list of connecting factors, although some plaintiffs have attempted to do this.[19]

By contrast, the CJPTA does not contain any provision on how to establish a real and substantial connection in the absence of one of the presumptions laid out in the statute. The trend in the past (pre-*Club Resorts*) is that where the plaintiff's case does not fit the criteria of the CJPTA, the courts can apply the common law principles to determine if a real and substantial connection exists.[20] For example, in *Penny (Litigation Guardian of) v. Bouch*,[21] the trial judge concluded that the case did not fall within the description of any of the twelve presumptions set out in the N.S. CJPTA[22] but noted that the N.S. CJPTA did not limit the plaintiff to the connecting factors set out in the statute to establish a real and substantial connection.[23]Accordingly, the trial judge considered the factors that the common law courts had taken into account in deciding cases involving assumed jurisdiction.[24] In doing so, the trial judge applied the principles set out by the Ontario Court of Appeal in *Muscutt*,[25] which at the time was the leading case in the common law, in order to determine whether there was a real and substantial connection.[26] The Nova Scotia Court of Appeal upheld the trial judge's conclusion. In addition, the Court of Appeal rejected the submission of the appellants that considerations of fairness have no place in the inquiry into the existence of a real and substantial connection and are only to be weighed during the analysis of *forum non conveniens*.[27]

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[17] Ibid. at paragraph 91.

[18] See *Sears Canada Inc. v. C&S Interior Designs Ltd.*, 2012 ABQB 573, 2012 CarswellAlta 1584 ["*Sears Canada*"]. The judge accepted the existence of a forum selection clause as a new presumptive connecting factor.

[19] For example, see *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2012 ONSC 7331. The Court rejected the location where damages are suffered as an appropriate presumptive connecting factor. See, also, *Frank v. Farlie, Turner & Co., LLC*, 2012 ONSC 5519. The plaintiff unsuccessfully argued that the defendant's participation in Ontario's capital markets and its engagement of the province's regulatory regime is a presumptive connecting factor similar to the existing connecting factor of "carrying on business in Ontario." The Court noted that the defendant was being sued as a quasi-receiver in bankruptcy for a novel common law tort and were not being sued for being engaged in or for contravening Ontario's securities legislation.

[20] See *Cameron v. Equineox Technologies Ltd.*, 2009 BCSC 221, 2009 CarswellBC 436 at paragraph 25 where the Court held that section 10 is not exhaustive and that "the court may have recourse to common law principles in order to establish a real and substantial connection." See, also, *Josephson (Litigation Guardian Of) v. Balfour Recreation Commission*, 2010 BCSC 603.

[21] 2009 NSCA 80 at paragraphs 2 and 19 ["*Penny* NSCA"], aff'g 2008 NSSC 378 ["*Penny* NSSC"].

[22] *Penny* NSSC, ibid. at paragraph 26.

[23] Ibid.

[24] Ibid.

[25] The eight contextual factors to determine a real and substantial connection in *Muscutt* are: (i) the connection between the forum and the plaintiff's claim; (ii) the connection between the forum and the defendant; (iii) unfairness to the defendant in assuming jurisdiction; (iv) unfairness to the plaintiff in not assuming jurisdiction; (v) the involvement of other parties to the suit; (vi) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (vii) whether the case is interprovincial or international in nature; and (viii) comity and standards of jurisdiction, recognition and enforcement prevailing elsewhere (see *Muscutt*, supra note 1 at paragraphs 77-110).

[26] *Penny* NSSC, supra note 21 at paragraph 33.

[27] *Penny* NSCA, ibid. at paragraph 51.

Subsequently, in *Club Resorts*, Justice LeBel attempted to clear the confusion flowing from *Muscutt*, with respect to the role of fairness in determining whether a real and substantial connection exists. LeBel J. stated that the principles or objectives of fairness, efficiency or comity should not be included in the list of presumptive connecting factors, whether existing or new. These principles or objectives should not be confused with the factual connections that will govern the assumption of jurisdiction.[28] Therefore, the common law has changed, such that fairness is no longer to be considered in determining whether a real and substantial connection exists in any one case. Rather, fairness, along with efficiency and comity, serve as analytical tools in determining new presumptive connecting factors at common law. It is wondered, therefore, if *Penny* would have been decided differently based on the new common law framework in *Club Resorts*.

Going forward, in cases where the plaintiff cannot demonstrate that at least one of the enumerated presumptive connecting factors is present, the defendants could simply argue that there are no sufficient connecting factors in the circumstances of the case, and thus, jurisdiction should not be assumed. On the other hand, the plaintiff could argue that the courts (either common law or those bound by the CJPTA) should recognize a new connecting factor, which gives rise to a real and substantial connection. Indeed, this was the case in the recent decision of the Alberta Court of Queen's Bench in *Sears Canada*,[29] which concluded that the presence of a choice of forum and jurisdiction clause should be added to the list of presumptive connecting factors set out in *Club Resorts*.

Sears Canada, which was an appeal from a Master's decision, concerned jurisdiction *simpliciter* and the appropriate choice of forum for a claim under breach of contract. In that case, the respondents, C&S Interior Designs Ltd. ("C&S") entered into various licensing agreements with the appellant, Sears Canada ("Sears"), which granted them the right to operate four franchises. The business relationship subsequently broke down and Sears terminated the licenses of all retail locations operated by C&S. The licensing agreement contained a choice of law and venue clause that stated that Ontario law and the Ontario courts would govern disputes between the parties.

Class action proceedings were commenced and certified in Ontario against Sears. Sears commenced a separate action in Alberta to recover alleged unpaid fees and charges owed under the licensing agreements, and damages for breach of contract. The respondents brought a motion in Alberta on the ground that the Alberta Court lacked jurisdiction to hear the dispute, or alternatively, that Ontario was the more convenient forum. The Master granted the motion on the basis that although Alberta had jurisdiction, Ontario was clearly the more appropriate forum. On appeal to a single judge, the judge upheld the Master's decision. In doing so, the judge referred to the four presumptive connecting factors set out in *Club Resorts* and held that the list of presumptive factors is open to expansion. He recognized the presence of a forum selection clause as a new presumptive factor.[30] While this presumptive connecting factor is already contained in the CJPTA (although that fact was not mentioned in *Sears Canada*), it is likely that a CJPTA court would undertake the same type of analysis, as adopted in *Club Resorts*, where the plaintiff was attempting to identify a new presumptive connecting factor in order for the Court to assume jurisdiction. However, given that this is one of the first cases, if not the first, that has identified a new presumptive connecting factor, it will be interesting to see whether this is the standard of analysis envisaged by Justice LeBel.

As a result of the emergence of the new presumptive connecting factor framework in *Club Resorts*, it is likely that CJPTA courts will no longer apply the *Muscutt* factors to determine whether a real and substantial connection exists at common law, in the absence of any presumptive connecting factor contained in the CJPTA. The *Muscutt* factors have been replaced by the Supreme Court's presumptive connecting factor test in *Club Resorts*. However, CJPTA courts can still have recourse to common law principles where no presumptive connecting factor exists in order to identify new factors, which also

[28] *Club Resorts*, supra note 5 at paragraphs 84 and 92.

[29] Supra note 18.

[30] Ibid. at paragraphs 20 and 22.

presumptively entitle a court to assume jurisdiction. Such guidance is not provided for in the CJPTA, but there is no reason, based on prior jurisprudence, why CJPTA courts should not refer to Justice LeBel's test to help identify new connecting factors.

Conclusion

It is to be expected that CJPTA decisions and common law decisions regarding jurisdiction will continue to speak to one another. Therefore, lawyers practicing in CJPTA provinces must be aware of the developments in the common law in relation to the real and substantial connection test, as the jurisprudence from those jurisdictions suggests that the common law test articulated in *Club Resorts* will be applicable in situations where a CJPTA presumption does not apply. Likewise, lawyers in non-CJPTA jurisdictions should be aware of the case law emanating from CJPTA provinces where new presumptive factors are established under the CJPTA based on the *Club Resorts* framework, as the analysis will be helpful in asserting a new presumptive connecting factor outside of the four enumerated in *Club Resorts*.

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