



International Transport

An ever smaller world means more multi-jurisdictional litigation, with interprovincial, cross-border, and international business and transport raising many jurisdictional issues. WeirFoulds LLP partner Frank E. Walwyn, whose practice includes private international law as it applies to complex business litigation, tests your knowledge with the help of Gareth Price, visiting Fox Scholar.

1 The *Pride of Markakisos*, a Greek-owned and managed ship, is chartered by an Ontario company to deliver cargo from Nova Scotia to London, U.K. Through apparent negligent seamanship, the *Pride of Markakisos* and its cargo sinks. The Ontario company brings an action in tort in Ontario, claiming its damages have been sustained in Ontario. The Greek owners challenge the jurisdiction of the Ontario court, seek a stay of proceedings, and assert that, pursuant to the contract, English law governs and, as such, is the more appropriate forum. Which of the following is correct?

- a) The burden of proving a real and substantial connection with Ontario falls to the Ontario company and the burden of proving that London is the more appropriate forum falls to the Greek company.
- b) The burden of proving there is no real and substantial connection with Ontario and that London is the more appropriate forum falls to the Greek company.
- c) The burden of proving a real and substantial connection with Ontario and that London is not the more appropriate forum falls to the Ontario company.

2 Following 2003's *Beals v. Saldanha (and Muscutt v. Courcelles)* and this year's *Van Breda v. Village Resorts Ltd.*, comity now mandates that an Ontario court's assumption of jurisdiction over international cases is as easily justified as in interprovincial cases, and the factors comprising the real and substantial connection test should apply equally to both interprovincial disputes and international disputes.

- a) True
- b) False

3 The Supreme Court of Canada's 1993 *Hunt v. T&N plc* stated that the assumption of jurisdiction "must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections." The Ontario Court of Appeal has stated this means that

- a) order and fairness is ultimately decisive when assessing the connection between the forum, the plaintiff's claim, and the defendant.
- b) order and fairness is a separate stage of inquiry as to whether the court should assume jurisdiction.
- c) order and fairness is part of the "real and substantial connection" test but ultimately cannot found an assumption of jurisdiction without such a connection.

4 Whether or not a defendant is insured against a certain claim will bear upon the court's assessment of fairness in assuming jurisdiction.

- a) True
- b) False



1 (A). Following the Ontario Court of Appeal decision in *Van Breda v. Village Resorts Ltd.*, a court, when addressing the test of “real and substantial connection” (cf. *Morguard Investments Ltd. v. De Savoye*, [1990], *Hunt v. T&N plc*, [1993], *Beals v. Saldanha*, [2003]), should determine whether the claim falls under rule 17.02 of the Ontario Rules of Civil Procedure. If it does, a “real and substantial connection” is presumed to exist, and the burden falls to the party contesting jurisdiction to rebut that presumption. However, subrules 17.02(h) (damage sustained in Ontario) and (o) (necessary or proper party) do not attract that presumptive effect. Therefore, the burden of proving a real and substantial connection because of damage sustained in the province remains with the plaintiff. The burden for proving that there is another more appropriate forum is a secondary and separate test to the “real and substantial connection” test and the burden for proving that remains with the party asserting it.

2 FALSE. The Supreme Court in *Beals* stated that the “real and substantial connection” test should apply equally to the recognition of foreign judgments. The Ontario Court of Appeal has stated, in *Van Breda*, that this assertion does not mean that the “real and substantial connection” test is equally applicable, in all circumstances (i.e. those circumstances beyond recognition of foreign judgments), to both interprovincial matters and international matters. There remain important juridical distinctions to be applied to judgments emanating from a Canadian court and judgments emanating from a non-Canadian court. This view is supported by *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, [2009].

3 (C). In *Van Breda*, the Ontario Court of Appeal accepted that while fairness, to both the plaintiff and the defendant, remain important factors to take into account

when deciding to assume or refuse jurisdiction, it is not a “separate inquiry” or an “independent factor capable of trumping the want of a real and substantial connection between the forum and the plaintiff’s claim and/or the defendant.”

4 FALSE. A defendant’s insurance in a dispute may be taken into account at the *forum non conveniens* stage as a factor mitigating any difficulty the defendant would otherwise have litigating in Ontario. It should not, however, be taken into account at the jurisdiction *simpliciter* stage when addressing fairness.

YOUR RANKING?

- **One or fewer correct:** *Might be time to brush up*
- **Two correct:** *Not bad, but could do better.*
- **Three correct:** *Very well done, but not perfect.*
- **Four correct:** *Impressive.*

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