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Jurisdiction *In Personam* and the Rules for Service *Ex Juris*

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Cases Considered:

Wheeler v. 1000128 Alberta Ltd., 2008 ABQB 70,

Introduction

Wheeler v. 1000128 Alberta Ltd., 2008 ABQB 70, was a complicated case in which the plaintiff alleged that he, and other members of a proposed class, had incurred losses as a result of the breach by the various defendants of the insider trading rules under Alberta's *Securities Act*, R.S.A. 2000, c. S-4. More specifically, the plaintiff alleged that, in a series of steps, China National Petroleum Corporation (CNPC), acting through its subsidiaries, and in particular 1000128 Alberta Ltd. (Alberta Co.), purchased the shares of PetroKazakhstan Inc. (PKZ), an international energy company with its head office in Calgary. He further alleged that, in the course of these steps, various of the defendants, with the knowledge of and in conspiracy with the other defendants, became aware of, acted upon, and disclosed to Alberta Co. certain material facts in breach of the Securities Act. According to the plaintiff, Alberta Co. then used this information to purchase shares in PKZ with money supplied by CNPC International Ltd. (CNPCI), a subsidiary of CNPC.

The plaintiff served the statement of claim on Alberta Co. and another Alberta corporation, CNPC International (Canada) Ltd., in Alberta. He was seeking leave to serve three other defendants *ex juris*. They were CNPC, CNPCI, and China National Oil & Gas Exploration & Development Corp. (CNODC), which was 100% owned by CNPC and the parent of CNPCI. The decision focused on whether the Alberta courts had jurisdiction to hear the plaintiff's action against these three foreign defendants.

Rules for Service *Ex Juris*

Alberta's present rules for service out of the jurisdiction are set out in Rule 30 of the *Rules of Court*, Alta. Reg. 390/68. More than those of any other Canadian jurisdiction they mirror the original rules for service *ex juris* first enacted in England in the middle of the 19th century. In particular, service *ex juris* requires the leave of the court; service *ex juris* is available only when the case fits within one of the grounds enumerated in Rule 30; and the grounds themselves have scarcely been amended over the years. In many other jurisdictions, leave to serve *ex juris* is not required where the case fits within one of the listed grounds and there is a general provision for

the service of originating process out of the province in all other cases with the leave of the court: see, for example, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 17.

In *Wheeler* itself, the plaintiff relied on various possible grounds for service ex juris under Rule 30 (at para. 32). In the final analysis, Justice John Rooke determined that the defendants outside Alberta were necessary parties to the action brought against the defendants served within Alberta (at para. 47). Thus, the case fell within Rule 30 (j) which provided that leave to serve originating process *ex juris* could be allowed whenever "a person out of Alberta [was] a necessary or proper party to an action properly brought against another person served within Alberta."

Jurisdiction *Simpliciter*: The *Morguard* Principle

Before 1990 the grounds for service *ex juris* would themselves have set the limits of a Canadian court's jurisdiction over absent defendants. That position changed, however, with the release by the Supreme Court of its landmark judgment in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.). *Morguard* in fact dealt with the circumstances in which a foreign court would be regarded as having jurisdiction for the purpose of the enforcement of its judgments in the forum. La Forest J. made it clear, however, that the same principles should apply to determine the existence of jurisdiction (jurisdiction *simpliciter*) by a domestic court over an absent defendant. He said, at 267:

> [T]he conditions governing the taking of jurisdiction by the courts of one province and those under which [their judgments] are enforced by the courts of another province should be viewed as correlative. If it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject-matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment.

On the basis of *Morguard*, the question of whether a court had jurisdiction depended upon whether there was a real and substantial connection between the forum and the subject-matter of the action or the defendant. Jurisdiction was no longer confined by the rules for service *ex juris*. Rather, the rules were "a procedural scheme that operate[d] within the limits of the real and substantial connection test": *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), at para. 50. *Morguard* itself was not argued in constitutional terms. Three years later, however, in *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.), the Supreme Court held that *Morguard* did establish a principle of constitutional law, at least where the defendant was to be found in another Canadian province.

Following the release of *Morguard*, there was uncertainty as to whether its effect was restricted to Canada or whether it applied to defendants outside of Canada and to judgments from outside of Canada. The lower courts were quick to extend the doctrine to international cases: see, for example, *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.). After some initial doubt at the Supreme Court level fostered by the decision in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* (2002), 220 D.L.R. (4th) 54 (S.C.C.), that court finally held that

the *Morguard* doctrine was not restricted to interprovincial suits: see *Beals v. Saldanha* (2003), 234 D.L.R. (4th) 1 (S.C.C.).

It is clear that, in order to satisfy the *Morguard* test, the plaintiff need only establish a real and substantial connection between the forum and the action. There is no requirement that the forum have the most real and substantial connection: see *Muscutt*, above, at para. 44 and Wheeler itself, at para. 19. On this basis, there was a reasonable argument that, where a plaintiff could show that the case fit within one of the traditional grounds for service *ex juris*, that fact alone should be sufficient to satisfy the *Morguard* test. In *Strukoff v. Syncrude Canada Ltd.* (2000), 80 B.C.L.R. (3d) 294 (C.A.), at para. 10, MacKenzie J.A. did indeed indicate that the various grounds for service *ex juris* in British Columbia were 'presumed to satisfy the real and substantial connection test.' LeBel J. in *Spar Aerospace*, above, at para. 56, was also of the view that the real and substantial connection test was 'already subsumed under the provisions' for service *ex juris* in Quebec's Civil Code. Later cases, however, have rejected this straightforward approach: see, for example, *Muscutt*; *Marren v. Echo Bay Mines Ltd.* (2003), 226 D.L.R. (4th) 622 (B.C.C.A.).

In *Wheeler*, Justice Rooke's analysis of service *ex juris* and jurisdiction *simpliciter* was a little confusing at times. Logically, he should first have determined the particular ground or grounds for service *ex juris* on which the plaintiff could rely. Then, he should have considered whether the *Morguard* test had been met. He never clearly differentiated, however, between these two discrete steps in the process. Instead, he concentrated upon whether the plaintiff had established the requisite real and substantial connection with Alberta and referred to the particular grounds for service *ex juris* almost as an afterthought. Nor was it clear from his judgment just how the grounds for service *ex juris* related to the *Morguard* test. Justice Rooke's approach should be contrasted with that of Phillips J. in *Royal and Sun Alliance Insurance Co. of Canada v. Wainoco Oil & Gas Co.*, 2004 ABQB 643, aff'd 2005 ABCA 198, on whose judgment he relied. Phillips J. was very clear that the first question was whether the case fit within one of the enumerated grounds of Rule 30 and the second question was whether the plaintiff had established the requisite real and substantial connection.

Application of the *Morguard* Test: The *Muscutt* Factors

In determining whether a real and substantial connection existed between the action or the parties and Alberta, Justice Rooke followed other Alberta authorities like Wainoco in relying heavily on the decision of the Ontario Court of Appeal in *Muscutt*. In particular, the court in *Muscutt* had isolated eight factors to be considered in the application of the *Morguard* test. Justice Rooke set out these components in para. 21:

1. The connection between the forum and the plaintiff's claim;
2. The connection between the forum and the foreign defendants;
3. Is there unfairness to the foreign defendants in assuming jurisdiction?;
4. Is there unfairness to the plaintiff in not assuming jurisdiction?;
5. The involvement of other parties to the suit;
6. The Court's willingness to recognize and enforce an extra-provincial 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.

Although Alberta is by no means the only jurisdiction other than Ontario to follow *Muscutt*, there are problems with the *Muscutt* approach. In reality, only the first two factors appear relevant to the question of the existence of a real and substantial connection. Considerations of fairness and of the involvement of other parties to the suit appear more relevant to the issue of whether a court should decline jurisdiction on the basis of principles of *forum non conveniens*. Indeed, *Muscutt* blurs the distinction between the existence of jurisdiction (jurisdiction *simpliciter*) and the exercise of jurisdiction (*forum non conveniens*): see the criticism of *Muscutt* by Drapeau C.J. in *Coutu v. Gauthier (Estate)* (2006), 264 D.L.R. (4th) 319 (N.B.C.A.), esp. at paras. 66-70. Other factors, like number six, seem meaningless. After all, the test for determining when a local (Alberta) court has jurisdiction is the same as that for determining when a foreign court has jurisdiction for the purpose of the enforcement of its judgments, i.e. the Morguard test. Still others, such as number eight, would be very difficult to apply: see Tanya Monestier, "A Real and Substantial Mess: The Law of Jurisdiction in Canada" (2007), 33 Queen's L.J. 179 for an excellent analysis and criticism of the *Muscutt* approach.

Perhaps for these reasons, Justice Rooke did not attempt to apply each *Muscutt* factor in turn. He did, however, point out specifically, at para. 23, that the case before him was an international one and, in accordance with the seventh *Muscutt* factor, a greater connection to the forum was required. For that proposition, Justice Rooke relied upon the judgment of Mahoney J. in *Deureneft Deutsche-Russische Mineralol Handelsgesellschaft mbH v. Bullen*, 2003 ABQB 743, who in turn had relied on the Supreme Court's judgment in *Spar Aerospace*, above. One would have thought, however, that the majority judgment of the Supreme Court in *Beals*, above, had laid to rest the idea that international cases should be dealt with differently from interprovincial cases.

Statutory Reform

Some provinces, like British Columbia, have now enacted legislation based on the *Uniform Court Jurisdiction and Proceedings Transfer Act*: see S.B.C. 2003, c. 28. It appears likely that Alberta will follow suit in the near future. The B.C. statute codifies the law based on *Morguard* by providing that the B.C. courts will have jurisdiction, inter alia, where there is a real and substantial connection between B.C. and the facts on which the proceeding is based (s. 3(e)). It also sets out various situations, similar to traditional grounds for service *ex juris*, that are presumed to satisfy the real and substantial connection test (s. 10). In concert with this statute, B.C.'s provisions for service *ex juris* in Rule 13 of the *Supreme Court Rules*, B.C. Reg. 221/90, allow for service *ex juris* without the leave of the court in any of the circumstances set out in s. 10 of the Act and, with the leave of the court, in any other case.

Conclusion

The present rules relating to service *ex juris* and jurisdiction *simpliciter* are unnecessarily complicated. Some of the complexity stems from the *Muscutt* approach which continues to be

followed in Alberta. Many of the same factors have to be considered both at the jurisdiction *simpliciter* stage and at the *forum non conveniens* stage. Jurisdiction requires only a real and substantial connection with the province, not the most real and substantial connection. Its determination should be a relatively straightforward process. The *Uniform Court Jurisdiction and Proceedings Transfer Act*, along with consequent changes in the *Rules of Court*, really does seem to be the preferable solution. It is to be hoped that it will not be too long before these reforms are enacted in Alberta.