Some Political Drama in the Conflict of Laws in Canada

The most recent chapter in the long-running and highly public dispute between businessman Karlheinz Schreiber and former Prime Minister of Canada Brian Mulroney involves significant conflict of laws issues. On December 20, 2007, Justice Cullity of the Ontario Superior Court of Justice released his decision holding that Schreiber's claim was dismissed for lack of jurisdiction. The decision is not yet posted but should be soon on the CanLII web site (available here).

In *Schreiber v. Mulroney* the plaintiff sued the former Prime Minister of Canada for $300,000, alleging that Mulroney had breached an agreement to help him with certain business ventures after leaving office. The underlying facts have raised some concerns, in part because of the way Schreiber paid Mulroney, which was in large amounts of cash. Mulroney was served outside Ontario, in Quebec. He moved to challenge the court's jurisdiction or in the alternative for a stay of proceedings in favour of Quebec.

Justice Cullity held that there was no real and substantial connection between the dispute and Ontario, and as a result Ontario did not have jurisdiction. He accordingly dismissed the action. On the facts, it is hard to argue with this decision. So much connected the dispute with Quebec and very little connected it to Ontario. Justice Cullity indicated that had the court had jurisdiction, he would have stayed proceedings in favour of Quebec.

There are several points in the decision worthy of at least brief comment. One relates to the issue of attornment. Mulroney's Ontario lawyer initially indicated a willingness to accept service, but on seeing the statement of claim he refused to do so because of the lack of connection between the

dispute and Ontario. Justice Cullity correctly held that this did not raise any issue of Mulroney having attorned – his lawyer did not in the end accept the service. More problematic, though, is his *obiter dictum* that "as it is accepted that valid service is not by itself sufficient to establish jurisdiction, an acceptance of service should not have this effect by treating it as an attornment and, in effect, a submission to the jurisdiction" (para. 25).

In this statement, Justice Cullity may be confusing issues of service inside the jurisdiction with those of service outside Ontario. Valid service outside Ontario is indeed not enough for jurisdiction: the real and substantial connection must also be shown. But this is not the case for service inside Ontario. If the defendant is served based on presence inside the jurisdiction, either personally or through an accepting Ontario lawyer, that has traditionally been sufficient for jurisdiction and, even in the wake of *Morguard*, there is no further search for a real and substantial connection. This raises no issue of attornment. Had Mulroney's lawyer accepted service in Ontario that should have ended the jurisdictional inquiry. The fact that an Ontario lawyer accepts service for a defendant outside the jurisdiction does not make this any less an instance of service inside the jurisdiction.

Second, Justice Cullity states that "Where a defendant moves to set aside service on the ground that there is no real and substantial connection with Ontario, the question will be whether there is a good arguable case that the connection exists" (para. 18.2). There is room to dispute, or maybe just dislike, this formulation. Put this way, the test may be too easy for a plaintiff to satisfy. The plaintiff does not have to only show a good argument that there is a real and substantial connection – the plaintiff must show such a connection does exist. If facts relevant to the analysis of jurisdiction are in dispute, then it is generally correct to say that only a good arguable case need be shown that those

facts can be established before the court can then make use of them in its analysis of the connection. But that analysis then looks for a real and substantial connection, not a good arguable case for such a connection. Whether there is a real and substantial connection is primarily a legal conclusion, not a factual one.

Third, Justice Cullity seems to think that the eight-factor *Muscutt* formulation is focused on tort claims, and that further factors need to be considered in contract claims (para. 37). He goes on to consider the place where the contract was made, performed and breached and where any damage was sustained. These are appropriate things to consider, but it may not be helpful to label them as additional factors to add to the eight in *Muscutt*. Rather, they are relevant considerations under some of those factors (which are reasonably general). One of these factors is the connection between the forum and the plaintiff's claim, and another is any unfairness to the defendant in taking jurisdiction. Each of these considerations can and should be considered as part of those factors, just as the location of where a tort occurred would be. Adding more factors to the *Muscutt* framework on a case-by-case basis runs the risk of making the analysis of a real and substantial connection even more complex.

Fourth, Justice Cullity's analysis of Rule 17.02, the heads for service out without leave, is not the most conventional. He starts his overall analysis looking for whether there is a real and substantial connection, and only subsequently comes on to look at the heads. While both must be satisfied in a service out case, the typically approach looks first at whether the claim fits within one or more heads, and then if it does looks for the connection. In addition, Justice Cullity, in quite brief reasons, finds that Schreiber's claim does not fit within the heads. This is something of a surprise given the breadth of Rule 17.02(h), damage sustained

in Ontario. Justice Cullity finds that Schreiber was in effect seeking restitution of the $300,000, rather than damages for breach of contract (para. 70). But this seems to adopt a very narrow meaning for the head. Even in a claim in unjust enrichment, the plaintiff has suffered a loss and that loss can be located geographically, Schreiber being an Ontario resident. It is hard to see how this loss is not “damage sustained”.

In the end, even if there is force to these criticisms, none of them impugn the conclusion that there was not a real and substantial connection to Ontario on the facts of this case. But much is at stake in this litigation, and so an appeal seems a reasonable possibility.