Approach to Jurisdiction under the CJPTA

The British Columbia Court of Appeal's decision in *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 (available here) is an important contribution to the developing Canadian jurisprudence on the Civil Jurisdiction and Proceedings Transfer Act, a statute governing the taking of jurisdiction that has been adopted in several provinces.

A leading common law approach to the question of whether there is a real and substantial connection between a dispute and the forum (the test for jurisdiction) is that outlined in the Court of Appeal for Ontario's decision in *Muscutt v. Courcelles* (available here). There is an ongoing controversy about the extent to which that approach has any relevance after a province has adopted the CJPTA. This is because the statute sets out an open-ended list of situations in which a real and substantial connection is presumed to exist (s. 10). However, it remains open to a plaintiff (under s. 3) to otherwise establish such a connection, and on one view the approach in *Muscutt* is relevant to that analysis. See in Nova Scotia the decision in *Bouch v. Penny* (available here).

In *Stanway* the court expresses considerable hostility towards the *Muscutt* approach. It references academic and judicial criticism of the decision, while selectively omitting any reference to the competing academic and judicial support for it. It makes clear that it has no application in cases that are caught by s. 10. It does not indicate what should happen in cases outside that section, but the overall tone suggests that it would not welcome using *Muscutt* in such cases.

My own view is that the *Muscutt* analysis should remain relevant to cases that are not caught by the statutory presumptions – cases which the statute has deliberately chosen to leave governed by the open-ended language of the real and substantial connection test.

Some might find it interesting that despite the difference in analysis between the appellate court and the motions court judge in *Stanway*, this is one of many cases where the two competing analyses reach the same conclusion (here that the court of British Columbia has jurisdiction).

The approach in *Muscutt* is the dominant one in Ontario, which has not enacted the CJPTA. However, last October the Court of Appeal for Ontario heard submissions about whether that approach should be modified. The decision in those appeals is eagerly awaited.