restraining the long arm of Ontario courts: Supreme Court of Canada clarifies private international law

When can an Ontario court assert jurisdiction over a foreign defendant? If it does so, when can the foreign defendant stay the Ontario litigation in favour of a more convenient forum? There is no statute to answer these questions and so litigants have looked to the courts for guidance. Until now, the jurisprudence has been unhelpful – emphasizing vague notions of fairness and a laundry list of factors that gave Ontario courts broad discretion. Fortunately, the Supreme Court of Canada has now held that "the assumption of jurisdiction cannot be an unstable, ad hoc system made up on the fly on a case by case basis – however laudable the objective of individual fairness may be".

On April 18, 2012, the Supreme Court released a trilogy of decisions (*Van Breda v. Village Resorts Limited, Éditions Écosociété Inc. v. Banro Corp. and Black v. Breeden*)[1] in which the Supreme Court upheld the assumption of jurisdiction by lower courts over disputes brought in Ontario against foreign defendants. Despite this result, the Supreme Court's restatement of the law has narrowed the test for jurisdiction in a way that should provide foreign businesses with greater predictability regarding when they will need to answer to a court in Ontario or elsewhere in Canada.

the claims against the foreign defendants

In *Van Breda*, two Canadians were injured while vacationing in Cuba. Upon returning from their trips, they claimed in Ontario

[1] 2012 SCC 17 [*Van Breda*], 2012 SCC 18 [*Éditions Écosociété*] and 2012 SCC 19 [*Black*].

against the foreign company that managed the two Cuban hotels where the accidents occurred.

In *Black*, a well known non-resident Canadian launched a defamation action in Ontario against the directors of a U.S. company. He alleged they published defamatory statements on their websites that were republished in Ontario causing injury to his reputation in the province. Similarly, *Éditions Écosociété* involved a libel action by an Ontario corporation in respect of defamatory statements contained in a book published in French by a Quebec publisher but distributed in Ontario.

In each of the three cases, the Supreme Court concluded that Ontario should assume jurisdiction, and was the appropriate and most convenient forum.

the prior Ontario jurisprudence

In Van Breda, the Ontario Court of Appeal had re-written its own jurisprudence by drawing inspiration from the Uniform Law Conference of Canada's model *Court Jurisdiction and Proceedings Transfer Act*. The Court of Appeal distilled its earlier, unwieldy eight factor test into a two step analysis. This simplification, however, was more apparent than real as the two step analysis recycled much of the old list of discretionary factors.

the Supreme Court's new test

The Supreme Court applauded the efforts of the Court of Appeal to streamline the test for assuming jurisdiction, but went even further and established a brand new test. In doing so, the Supreme Court significantly reduced the discretion of Ontario courts in deciding whether the dispute is connected to the forum. It isolated the following presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute in tort to when:

(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; or

(d) a contract connected to the dispute was made in the province.

The Supreme Court did not close the list of presumptive connecting factors permanently. It agreed that, over time, courts may identify new factors which may also create a presumption of jurisdiction.

The presumption of jurisdiction that arises where a connecting factor applies is rebuttable. To negate the presumptive effect of a connecting factor, a party challenging jurisdiction could argue that the presumptive factor does not point to a real connection between the litigation and the forum, or that the connection is weak.

For example, assume that a foreign company actively advertizes on its website. The fact that the website can be accessed from Ontario would not suffice to establish that the foreign company is carrying business in Ontario. However, if the company e-traded in Ontario, it would be more likely to establish that the company carried business in the province, and that there is real and substantial connection between the company and Ontario.

Interestingly, the Supreme Court chose not to elaborate on potential grounds for asserting jurisdiction in the absence of a real and substantial connection to a Canadian forum. The Ontario Court of Appeal had held that jurisdiction may also be assumed when there was no other forum available to hear the dispute. The Supreme Court left the issue of this "forum of necessity" doctrine open to be resolved in another case.

If jurisdiction is established, the claim can proceed, subject to the court's discretion to stay the proceedings if the defendant can point to another jurisdiction that is clearly a more appropriate forum than an Ontario court for the trial (*forum non conveniens*). Here, the Supreme Court did allow courts to retain wide discretion. The factors that a court may consider in deciding whether to apply *forum non conveniens* vary depending on the context of the dispute, but generally include: the location of the

parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on parallel proceedings, the possibility of conflicting judgments, possible difficulties of enforcing the judgment, etc.

lessons for foreign companies

In light of the new connecting factors outlined in *Van Breda*, foreign companies that reside, conduct business or enter into agreements in a Canadian province are subject to its jurisdiction, unless they can rebut the presumption of a real and substantial connection to the Canadian jurisdiction.

Since the presumptive factors listed in *Van Breda* are not exhaustive, foreign companies with connections to Canada should monitor the development of this area of the law to be aware of any new presumptive factors that courts may identify in the future. If they want to avoid Canadian courts, foreign companies should consider exclusive forum or arbitration clauses in their contracts. These clauses will generally be enforced by Canadian courts that would otherwise have jurisdiction.

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A previous discussion of the Ontario Court of Appeal's decision and its subsequent interpretation in Ontario can be found at http://www.mcmillan.ca/93443 and http://www.mcmillan.ca/Are-Injuries-in-Ontario-Enough.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.