April 19, 2012

Supreme Court of Canada Revamps the Test for Jurisdiction over Foreign Defendants

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In a recently released pair of cases, Club Resorts Ltd. v. Van Breda and Club Resorts Ltd. v. Charron (“Van Breda”) the Supreme Court of Canada has updated and clarified the “real and substantial connection test” that Canadian courts must apply to determine whether they have jurisdiction over foreign and out-of-province defendants. The new analytical framework simplifies the test and provides some clear guidance for judges. This is good news for businesses that are not resident in a Canadian province but engage in activities that could potentially bring them within the ambit of its courts. They can now expect greater consistency and predictability in judicial decisions to assume or decline jurisdiction over international and interprovincial disputes.

Both of the cases on appeal before the Supreme Court involved actions for personal injuries suffered by Canadian tourists at resorts in Cuba. The defendant Club Resorts is incorporated in the Cayman Islands and managed the hotels where the accidents occurred. In both cases, Club Resorts sought to dismiss or stay the proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum. In both instances, the motion judges dismissed Club Resorts’ motions, finding that Club Resorts had a sufficient connection to Ontario to permit the assumption of jurisdiction.

These decisions were appealed to the Ontario Court of Appeal, which convened a special five-judge panel to reconsider the content of the real and substantial connection test. The Court of Appeal rearticulated the test in an attempt to increase the consistency and predictability of the jurisdictonal determinations of Ontario courts.

The Court of Appeal’s decision was then appealed to the Supreme Court, which unanimously endorsed a new framework for the real and substantial connection test. The Supreme Court went even further than the Court of Appeal in an effort to improve the predictability and certainty of the real and substantial connection test.

THE NEW FRAMEWORK FOR THE “REAL AND SUBSTANTIAL CONNECTION” TEST

A Canadian court will have jurisdiction over a dispute when there is a “real and substantial connection” between the litigation and the jurisdiction. In Van Breda the Supreme Court explained that the inquiry
involves two stages:

1. First, the plaintiff has the onus of establishing that a “presumptive connecting factor” connects the litigation to the jurisdiction.
2. Second, if the plaintiff succeeds in establishing that a presumptive connecting factor exists, the defendant has the opportunity to rebut the presumption of jurisdiction by showing that, on the facts of the particular case, the connection is insufficient to establish a real and substantial connection.

Step 1: Analysis of the Presumptive Connecting Factors

At the first stage, the plaintiff must show that the litigation is joined to the jurisdiction by one or more “presumptive connecting factors”. Where one or more of the presumptive connecting factors is present, the court is presumed to have jurisdiction over the litigation (subject to the defendants’ opportunity to rebut the presumption). Conversely, if no recognized presumptive connecting factor is present, the court should not assume jurisdiction.

The Supreme Court identified four presumptive connecting factors in the context of tort claims:

(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; and
(d) a contract connected with the dispute was made in the province.

This list is not exhaustive. The Supreme Court left the door open for courts to identify new factors that will trigger a presumption of jurisdiction in the future, but cautioned that the identification of such new factors must be consistent with the values of order, fairness and comity.

The Supreme Court also confirmed that the presence of a plaintiff in the jurisdiction is not, by itself, a sufficient connecting factor to ground the assumption of jurisdiction. Similarly, an allegation that the plaintiff has suffered damages in the jurisdiction is insufficient. Neither of these bases would ensure that the plaintiff’s claim has a sufficient connection with a province to trigger a presumption of jurisdiction.

Step 2: Rebutting the Presumption of Jurisdiction

If a presumption of jurisdiction is engaged, the onus shifts to the defendant, who may rebut the presumption. The Supreme Court gave the following explanation of what the defendant must establish to rebut the presumption:

“[The defendant must] establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.”

For example where the presumptive connecting factor is a contract made within the jurisdiction, the presumption can be rebutted by showing that the contract does not relate to the subject matter of the litigation. The Supreme Court also explained that even if a defendant carries on business in a province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant’s business activities in the province.

If the defendant succeeds in rebutting the presumption of jurisdiction, the court must decline to determine the matter. However, it should be noted that even if the court has jurisdiction over a matter, the defendant can still argue that the court should decline to exercise that jurisdiction in favour of
proceedings in another province or country which may be the more appropriate forum in which to the
litigate the dispute (i.e., under the forum non conveniens doctrine).

THE PRESCRIPTIVE CONNECTING FACTOR OF CARRYING ON BUSINESS

An important question for businesses, especially internet-based companies that may have a “virtual”
presence in many jurisdictions around the world, is what it means to “carry on business” in a Canadian
province. Although it is not necessary for a business to be headquartered in a province to be “carrying on
business” there for the purposes of the real and substantial connection test, the Supreme Court
explained that a business must have “some form of actual, not only virtual, presence in the jurisdiction,
such as maintaining an office there or regularly visiting the territory of the particular jurisdiction”. The
Supreme Court also noted that even “active advertising” in a province would not be sufficient, by itself,
to establish that the defendant is carrying on business there.

The Supreme Court also acknowledged that it was not asked, and did not decide, when e-trade within a
province would amount to presence in the jurisdiction, leaving this question to be decided on an
appropriate factual record. This important issue will no doubt be addressed in future case law.

THE NEW FRAMEWORK PROVIDES GREATER PREDICTABILITY

The Van Breda decision is a positive development that is attuned to contemporary business realities,
including the increasingly global nature of commerce, and to the need for greater jurisdictional
certainty. As the Supreme Court explained: “[Justice and fairness] cannot be attained without a system of
principles and rules that ensures security and predictability in the law governing the assumption of
jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will
assume jurisdiction in a case with an international or interprovincial aspect.”

We will watch with interest as the lower courts apply the decision in new factual scenarios, providing
concrete guidance, for example, about the meaning of carrying on business in a jurisdiction. It will also be
interesting to see whether the lower courts use the principles of order, fairness and comity to develop
new presumptive connecting factors.

THE SUPREME COURT’S DISMISSAL OF THE APPEALS IN VAN BREA AND
CHARRON

The Supreme Court dismissed both the Van Breda and Charron appeals. In both cases, the plaintiffs had
met the onus of establishing a presumptive connecting factor: in Van Breda a relevant contract had been
entered into in Ontario, in Charron the defendant carried on business in Ontario. The Supreme Court held
that the defendant had failed to rebut the presumption in either case and, accordingly, the Ontario court
had jurisdiction on the basis of the real and substantial connection test.

RELATED APPEALS: BREEDEN V. BLACK AND ÉDITIONS ÉCOSOCIÉTÉ INC. V.
BANRO CORP.

Along with Van Breda, the Supreme Court also released related decisions in a pair of defamation cases,
cases apply the Supreme Court’s refined real and substantial connection test and provide guidance on
the test for forum non conveniens. In both cases, the Supreme Court considered whether the Ontario
Superior Court of Justice was entitled to exercise jurisdiction over actions in which an Ontario resident
alleges that an extra-provincial defendant made defamatory statements that were published in Ontario. In both cases, the Supreme Court of Canada held that Ontario had jurisdiction over the disputes because, on the facts of those cases: (a) the alleged tort of defamation was committed in Ontario; and (b) the defendants failed to displace the presumption of jurisdiction.


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