AN EXAMINATION OF JURISDICTION AND FORUM SINCE *CLUB RESORTS LTD. v. VAN BREDA*

By Jennifer Pereira, Robertson Stromberg LLP, a member of the Arc Group Canada Inc.
With special thanks to James Steele for his assistance

Introduction:

In an ever-more connected world, the issue of jurisdiction is a matter of considerable significance. Should the need for adjudication arise, disagreement between the parties can often ensue as to which forum is properly entitled to hear the case. *Club Resorts Ltd. v. Van Breda*,[1] released by the Supreme Court of Canada earlier this year, offers welcome clarification concerning both the assumption and exercise of jurisdiction.

Jurisdiction *Simpliciter:*

The *Van Breda* judgment arose out of two separate claims made against a number of foreign defendants, one of whom was Club Resorts Ltd., a resort management company incorporated in the Cayman Islands. The first claim arose out of a grievous accident which was suffered by Morgan Van Breda while vacationing at a Cuban resort. The second was brought by the estate and family of Claude Charron, who perished during a scuba diving excursion organized by another Cuban resort. Both of these vacation facilities were managed by Club Resorts. As defendant, Club Resorts sought to prevent the proceedings, asserting that the Ontario court did not properly have jurisdiction. Alternatively, they argued that a Cuban forum would be more appropriate under the doctrine of *forum non conveniens.*

[1] 2012 SCC 17, [2012] ACS no 17 [*Van Breda*].

In his writing for the majority of the Court, Justice LeBel stresses the need for stability and certainty regarding jurisdictional questions. Though individual fairness is of obvious importance, it cannot be attained without "a system of principles and rules that ensures predictability in the law governing the assumption of jurisdiction by a court."[2] Such consistency is to be arrived at through use of presumptive connecting factors as part of the "real and substantial connection" test.[3]

The real and substantial connection test was first introduced to Canadian jurisprudence in *Moran v. Pyle National (Canada) Ltd.*[4] The test requires the party advocating jurisdiction to establish a connection between the litigated matter and the forum. Justice LeBel's opinion enumerates four such connecting factors. These are described as specifically applicable to tort claims, but for reasons given below they can also provide broader guidance. The factors are as follows:

(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.[5]

The list of presumptive connecting factors is not finite, and may be reviewed or augmented over time. LeBel J. writes that in "identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors."[6] Therefore, these above four factors may serve as instructive examples when considering comparable factors in areas of law other than tort.[7]

---

[2] *Ibid* at 73.

[3] In addition, at paragraph 79, LeBel J. affirms the traditional grounds for assuming jurisdiction, such as the defendant's presence in the jurisdiction, or where the defendant has consented to submit to the forum.

[4] [1975] 1 SCR 393.

[5] *Van Breda, supra* note 1 at 90. The locality wherein damage was sustained – distinct from where the wrong itself occurred – is not deemed to be a presumptive factor. LeBel states that to do so would risk "sweeping into that jurisdiction claims that have only a limited relationship with the forum."

[6] *Ibid* at 91

[7] When recognizing additional factors, regard should be had to the following considerations, outlined at paragraph 91 of *Van Breda*:

(a) similarity of the connecting factor with the recognized presumptive connecting factors;

If no presumptive factors pertain to the matter, the court must dismiss or stay the action for want of a real or substantial connection.[8] Even should jurisdiction in fact be recognized through use of the connecting factors, the presumptive factor(s) may still be rebutted by the party contesting the local jurisdiction. This is done by adducing facts which demonstrate that the connecting factor, in actuality, signifies little or no connective relationship.

Forum Non Conveniens:

Should jurisdiction ultimately be found as properly assumed, the remaining option for the challenging party is to raise the doctrine of *forum non conveniens*[9], which is distinct from the preliminary issue of jurisdiction *simpliciter*. *Forum non conveniens* allows a court, properly entitled to hear a case, to nevertheless decline to do so if another forum is decidedly more convenient. The party raising the doctrine bears the burden of establishing that the alternative forum is "clearly more appropriate"[10] and bears features more promotive of fairness and efficiency. Courts may consider various factors when comparing different forums, including:

(a) the locations of the parties and witnesses;

(b) the cost of transferring the case to another jurisdiction or of declining the stay;

(c) the impact of a transfer on the conduct of the litigation or on related proceedings;

(d) the possibility of conflicting judgments;

(e) problems related to the enforcement of judgments; and

(f) the relative strengths of the connection of the two parties.[11]

(b) treatment of the connecting factor in the case law;
(c) treatment of the connecting factor in statute law; and
(d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

These latter three principles – order, fairness and comity – though not presumptive factors themselves, are influential when "a court considers whether a new connecting factor should be given presumptive effect…the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new."

[8] Unless the forum of necessity doctrine should apply.

[9] *Latin*: forum not agreeing

[10] *Ibid* at 108.

[11] *Ibid* at 110.

Ruling in *Van Breda*:

The above analysis was applied to the two claims comprising *Van Breda*. Determinative in the *Van Breda* case was that the contract between the plaintiff and Club Resorts had been formed in Ontario. Club Resorts could not refute the resulting presumption of jurisdiction. Turning to the *forum non conveniens* issue, the defendant was also unable to demonstrate that a Cuban court would clearly be a more appropriate forum. While an obvious relationship existed between Cuba and the litigated matter, matters of efficiency and fairness argued against recognizing Cuba as the more convenient or appropriate forum. Justice LeBel specifically adverted to:

(a) possible problems with witnesses;

(b) concerns about local procedures; and

(c) the expense involved in litigating in Cuba.[12]

Club Resort's challenge to the *Charron* claim was similarly dismissed. The active commercial presence of the defendant in Ontario was held to be a presumptive connecting factor, and not rebutted by the defendant. Club Resorts was again unsuccessful in demonstrating that a Cuban court would clearly be a more appropriate forum in the circumstances.

Judicial Significance of *Van Breda*:

Through *Van Breda,* the Supreme Court has modified the previously accepted framework of analysis established in *Muscutt v. Courcelles.*[13] The *Muscutt* criterion had involved the balancing of eight different factors in the course of determining jurisdiction. This test had too often lent itself to individual judicial discretion, as well as being cumbersome in application.

[12] *Ibid* at 118.
[13] [2002] OJ No. 2734, 213 DLR (4th) 661 (Ont CA).

One might posit that the eight factors of *Muscutt* are essentially distilled by *Van Breda* to a single issue: whether there exists a real connection between the matter and the forum. With its reliance on objective presumptive factors, the simplified *Van Breda* test aspires to greater clarity in the law, so as to permit "[p]arties…to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect."[14]

Van Breda and Insurance:

Owing to its recent issuance from the Supreme Court, *Van Breda* has been judicially considered by only a single insurance law case. *Cugalj v. Wick*[15] concerned an automobile accident in Alberta involving parties based respectively in Alberta and Ontario. The latter party later sued the Alberta party in Ontario Superior Court, whereupon the Ontario jurisdiction was disputed by the defendant.

The central issue dealt with whether a connecting factor analogous to those in *Van Breda* arose from the fact that the defendant was represented by an Ontario insurance company. The plaintiffs emphasized that this insurer was conducting the lawsuit on behalf of the defendant, and that any resulting judgment could be collected directly against the insurance company itself.

The court in *Cugalj* rejected the plaintiff's position. Firstly, prior case law evidenced no precedent where the location of a non-party responding insurance company had supported a finding of jurisdiction. Second, it was doubtful on the facts whether any judgment would even be ordered. Most importantly, Justice Hourigan referred to the intent of *Van Breda* and declared that to permit recognition of this new presumptive factor would be contrary thereto. Rather than fostering stability or certainty, it would instead provoke confusion. Moreover, the recognition of such a tenuous connecting factor would engender a flood of similarly frivolous claims.

[14] Van Breda, supra note 1 at 73.
[15] [2012] OJ No 1719, 2012 ONSC 2407.

Conclusion:

As more generally regards the Canadian and international effect of *Van Breda*, it may reasonably be supposed that a foreign entity will be exposed to litigation in a local forum, provided that it is domiciled in, conducts business in, or closes contracts in that jurisdiction. It is interesting to note however that businesses with a solely internet-based presence in a location will apparently lack a real and substantial connection with that forum. This is due to Justice LeBel's statement that "carrying on business requires 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."[16]

[16] *Van Breda, supra* note 1 at 87.