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My Jurisdiction or Yours? SCC Sets New and Improved Jurisdiction Test in Canada

By: Peter Pliszka | Toronto

On April 18, 2012 the Supreme Court of Canada changed the "real and substantial connection" test for determining when a Canadian court is allowed to take jurisdiction over a foreign (extra-provincial or international) defendant. This decision is good news for Canadian and foreign companies. The new test confirms that the "real and substantial connection" must be an objective factual connection to the court's territory, and the SCC clearly stated that subjective notions of "fairness to the plaintiff" are not part of the test.

The SCC's decision arose from the appeal of two cases, which were heard together*: Club Resorts Ltd. v. Van Breda* and *Club Resorts Ltd. v. Charron*; 2012 SCC17. The facts of the *Van Breda* and *Charron* cases were similar. In each case, an individual travelled to a resort in Cuba. In *Van Breda*, the individual was catastrophically injured in an accident on the resort property; in *Charron*, the individual died while scuba diving at the resort. In both cases, lawsuits were commenced in Ontario against a number of parties, including Club Resorts Ltd., a Cayman Islands company which managed the two resorts where these accidents occurred.

Club Resorts applied to the Ontario Superior Court for preliminary orders dismissing both actions as against Club Resorts on the basis that the Ontario court did not have jurisdiction over these claims because the actions relate to events which occurred in Cuba. In each case, the motion judge dismissed Club Resorts' motion and found that the Ontario court has jurisdiction. The Ontario Court of Appeal dismissed Club Resorts' appeal. Club Resorts appealed further to the SCC.

At the SCC hearing, Club Resorts argued that the Ontario courts' interpretation of the "real and substantial connection" test for determining when an Ontario court should assume jurisdiction over a foreign defendant was inappropriate for a variety of reasons. In particular, the Ontario test allowed a motion judge to consider whether he/she believes it would be "unfair" to require an Ontario plaintiff to sue a foreign defendant in that foreign defendant's home jurisdiction as a relevant factor in determining whether there is a real and substantial connection between the lawsuit and Ontario.

The SCC agreed with Club Resorts that the existing Ontario test for jurisdiction was inappropriate and required reformulation. Writing for a unanimous court, LeBel J noted that while a test for determining jurisdiction must undoubtedly have justice and fairness as its ultimate purpose, justice and fairness cannot be attained without a system of principles and rules that ensure certainty and predictability in the law. To that end, LeBel J. observed that the identification of a set of relevant presumptive connecting factors between the geographic territory of the court and the subject-matter of the lawsuit against the foreign defendant will bring greater clarity and predictability to the determination of this issue in a given case. That, in turn, will ensure consistency with the objectives of fairness and efficiency.

LeBel J determined that jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject-matter of the lawsuit with the territory of the court. Examples of such objective connecting factors include: whether the foreign defendant carries on business in the court's territory; whether the defendant has a physical presence in the court's territory (e.g. an office); whether the tort (i.e. the alleged wrongful act) occurred in the court's territory; or whether a contract was made in the court's territory. If such an objective connecting factor is present, then there is a presumption that the Canadian court has jurisdiction over the lawsuit against the foreign defendant. However, that presumption is rebuttable; the onus is on the foreign defendant to show facts which demonstrate that the presumptive connecting factor does not actually point to any real relationship between the subject matter of the lawsuit and the court's territory – e.g., if the foreign defendant carries on business in Ontario but that line of business is unrelated to the subject-matter of the lawsuit. If the defendant fails to meet that onus, then the court has jurisdiction.

Conversely, the test is not rebuttable for the benefit of the plaintiff. If the court finds that there is no objective connecting factor to give rise to a presumption of jurisdiction, then that ends the matter. There is no opportunity for the plaintiff to try to rebut the presumption that the court lacks jurisdiction over the lawsuit against the foreign defendant. In that scenario, the court must terminate the lawsuit.

The SCC noted that some provinces have enacted legislative tests for determining the issue of jurisdiction. The SCC confirmed that under Canada's constitutional division of powers between the federal government and the provinces, provincial legislatures are entitled to develop

their own approaches to determining jurisdiction in civil lawsuits provided they abide by the territorial limits of their authority, as reflected by the principles set out in the SCC's jurisdiction test.

Applying this new test to the facts of the *Van Breda* and *Charron* cases, the SCC held that the Ontario court did have jurisdiction because objective connecting factors did exist. In *Van Breda*, the connecting factor was an employment contract which was made in Ontario and related to the underlying events giving rise to the lawsuit. In *Charron*, the connecting factor was found to be marketing-related activities which promoted the Cuban resort and, in the SCC's opinion, constituted "carrying on business" in Ontario.

This SCC decision is relevant to businesses and people who are sued in Canadian courts in provinces where they do not physically reside. The SCC has signalled its clear intention that, for the sake of an orderly and objectively fair legal system, the legal test for determining the question of jurisdiction over a lawsuit against a foreign defendant must be susceptible of substantial predictability. The SCC says that this predictability is achievable if jurisdiction can be taken only where an objective connecting factor between the court's territory and the lawsuit exists. No longer should jurisdiction be taken simply on the basis of a subjective notion that forcing an individual plaintiff within the court's geographic territory to have to sue the foreign defendant somewhere outside of his/her home province is "unfair".

The enhanced certainty and predictability that should flow from this decision is expected to put business people in a better position to assess and manage litigation risk in Canada.

Peter Pliszka, a Partner in the Toronto office of Fasken Martineau DuMoulin and co-chair of the firm's Cross-Border Litigation Group, was lead counsel for Club Resorts in the *Charron* case. Readers who would like further information about this decision, or the manner in which Fasken Martineau can assist with their cross-border litigation needs, may feel free to call Peter.

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