Van Breda Revisited – The *Forum of Necessity* Exception

A Commentary on *West Van Inc. v. Daisley, 2014 ONCA 232*

In Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 S.C.R. 572, which has been discussed by us in several commentaries, the Supreme Court of Canada left as the sole exception to the real and substantial connection test, the possibility of allowing an action which did not meet that test to proceed on the basis of the doctrine of "*forum of necessity*".

The doctrine of "*forum of necessity*" is a relatively new doctrine that was first adopted as part of the Quebec Civil Code in 1994 and was enacted as part of the statute law of several provinces in the early 2000's. It has not been enacted by statute in Ontario, and the Van Breda decision was the first recognition of a common law doctrine of *forum of necessity* (albeit *obiter*) in Canada.

West Van Inc. v. Daisley, 2014 ONCA 232, released March 27, 2014 was the first case in Canada in which a common law appellate court had to deal with the issue of *forum of necessity* directly.

In West Van Inc. v. Daisely, the plaintiff started a solicitor's negligence action in Ontario against their former attorneys, a North Carolina law firm, who had unsuccessfully defended a North Carolina law suit on their behalf. It was conceded that the real and substantial connection test was not met, but the plaintiff argued that the court should exercise its discretion to allow the action to proceed under the *forum of necessity* doctrine on the grounds that it could not obtain qualified counsel in North Carolina to represent it, and, even if it could, it was unlikely that it would get a fair trial in North Carolina

The plaintiff filed affidavit material to show that it had contacted 31 different law firms in the two largest cities in North Carolina and all had declined to accept a retainer as soon as they learned who the proposed defendant was.

Referring back to the Ontario Court of Appeal decision in *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84, 98 O.R. (3d) 721, the court recalled that Sharpe, J.A. had stated:

> …The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace "forum of last resort" cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be

> accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.

The Ontario Court of Appeal observed, as follows, that the bar for a *forum of necessity* claim was very high:

> [20] All jurisdictions in Canada that have recognized the forum of necessity have incorporated a "reasonableness" test. In Ontario, under Van Breda, the plaintiff must establish that "there is no other forum in which the plaintiff can reasonably seek relief." Article 3136 C.C.Q. provides as follows:
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> Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside of Québec or where the institution of such proceedings outside Québec cannot reasonably be required.
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> And s. 6 of the ULCC's model law provides as follows:
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> > 6. A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that
> >
> > (a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding, or
> >
> > (b) the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required.
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> [21] **The "reasonableness" requirement has been stringently construed**. [emphasis added]

The Court went on to say:

> [39] The onus is on the appellant to establish that it cannot reasonably seek relief in North Carolina. In my view, despite the fact that it was unsuccessful in retaining counsel after contacting a significant number of counsel who held themselves out as having expertise in professional misconduct matters, the appellant has not discharged that onus.
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> [40] As Sharpe J.A. made clear in Van Breda, the forum of necessity is reserved for exceptional cases. LeBel J.A. explained in *Lamborghini* [*Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*, [1997] R.J.Q. 58 (C.A.)] that the "reasonableness" requirement is very stringently construed. The examples of the exceptional reasons why a proceeding could not be reasonably required in a foreign jurisdiction that he provided, while not exhaustive, are illustrative: "the breakdown of diplomatic or commercial relations with a foreign State, the need to protect a political refugee, or the existence of a serious physical threat if the

> debate were to be undertaken before the foreign court."[5] It is this type of claim that prompted this court to recognize the forum of necessity: see Van Breda, at para. 54. …
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> [41] The doctrine of forum of necessity is unlikely to be successfully invoked on what is in essence a private, commercial matter, on the basis of inability to obtain counsel. This is especially so within the United States of America – a country with many lawyers, in large centres and small, and what is often characterized as a litigation-hungry culture. And it cannot be done so in this case: the appellant did not seek counsel in North Carolina outside of its two main centres, and did not address the feasibility of having out-of-state counsel either act for it in North Carolina or, without becoming counsel of record, "back up" local counsel without particular expertise in professional misconduct matters.
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> 42] Nor do the appellant's expressed doubts that – as a Canadian company suing a "home-team" law firm – it will receive a fair trial in North Carolina satisfy the heavy onus upon it.

The result is that the Court of Appeal has set the bar for invoking *forum of necessity* exceedingly high and has made it very clear that it will be invoked in only the most exceptional of cases.

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