Jurisdictional Creepage
(*Van Breda* Revisited)

A Commentary on *Cesario v. Gondek*
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Ever the wide-eyed optimist, in my commentary on the Supreme Court decision in *Club Resorts v. Van Breda*, 2012 SCC 17 , I wrote that that decision should put an end to suits in Ontario arising from torts in foreign jurisdictions, absent a contractual connection between the foreign defendant and Ontario.

How wrong I was! In *Cesario v. Gondek et al.*, 2012 ONSC 4563 (CanLII), the erosion by the lower courts of the procedural safeguards given to foreign defendants by the Supreme Court of Canada appears already to have begun.

In the *Cesario* case, a vehicle driven by Dominic Cesario was rear-ended by a vehicle owned by a New York State resident, Rotella, and operated by a New York resident, Gondek. The accident happened in New York State. Dominic Cesario and his wife Rosa Cesario (who was a passenger in the vehicle) were both Ontario residents.

The Cesarios started an action in Ontario against Gondek and Rotella, and notwithstanding that liability did not appear to be seriously in issue, Rosa Cesario started a separate action against her husband and Gondek and Rotella.

The plaintiffs included their underinsured carrier, TD Insurance as an additional party.

Unfortunately, the Cesarios were involved in a second accident within a month, this time in Ontario and included in the action another defendant, Stoutz, the tortfeasor with respect to the second accident.

In the *Cesario v Gondek* case, the court dismissed a motion brought by the defendants Gondek and Rotella to have the Ontario action stayed against them for want of jurisdiction.

It is submitted that in doing so, the court misinterpreted the Supreme Court of Canada's decision in Van Breda.

In order to understand why, a brief history of this issue is in order.

In what became known as the in the "*Muscutt* quintet (*Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.); *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84 (C.A.); *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76 (C.A.); *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.), five cases which were heard together by the Ontario Court of Appeal) the court set out rules for determining when and if an Ontario Court could or should take jurisdiction

over a foreign defendant or with respect to a foreign cause of action. Ever since then, until the *Van Breda* decision, there was a creepage of the limits as courts gradually construed these rules to allow them to exercise jurisdiction in broader and broader circumstances. This resulted in a situation where Ontario courts were taking jurisdiction in situations that astounded counsel in other jurisdictions – situations in which foreign courts would never have entertained taking jurisdiction if the situation were reversed.

The Ontario Court of Appeal, in the 2010 decision of *Van Breda v. Village Resorts Ltd,* 2010 ONCA 84, 98 O.R. (3d) 721 set out to limit the situations in which an Ontario court would exercise jurisdiction and on appeal to the Supreme Court of Canada, sub nomine *Club Resorts v. Van Breda*, 2012 SCC 17, the Supreme Court tightened the limits even further.

The key to the Supreme Court's decision is a list of presumptive factors set out at para. [90] of the decision, which reads:

> "[90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
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> (b) the defendant carries on business in the province;
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> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province."

The court went on to say:

> "[93] If, however, no recognized presumptive connecting factor — whether listed or new — applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system."

The court further stated:

> "[100] To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts

> may, over time, identify additional presumptive factors."

In short, unless the Cesarios could bring the case within one of the four presumptive factors set out above or could convince the court to add a new presumptive factor, the action should not have been allowed to proceed against the New York defendants.

The court in *Cesario* did not purport to be adding a new presumptive factor, so the only question is whether it could legitimately fit the fact situation into one of the existing four presumptive factors.

The court in *Cesario* attempted to fit the claim within the first presumptive factor, stating as follows:

> "[23] As to the first presumptive factor whether "the defendant is domiciled or resident in the province", this motion raises for determination whether the Supreme Court of Canada in Van Breda was referring to "the defendant" being domiciled or resident in the province as being the moving defendant or whether any defendant in the action domiciled or resident in the province was sufficient for a connecting factor. The answer to this question can be found in paragraph 99 of Van Breda which provides:
>
> > 'I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.'
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> [24] If the position of the New York defendants was accepted, the plaintiffs could be forced to litigate three separate actions; one of which would be heard in the State of New York and two of which would be heard in the Province of Ontario. Such a situation would, adopting the language of Van Breda, "breach the principles of fairness and efficiency on which the assumption of jurisdiction is based". In addition, adopting the concluding words of LeBel J. in Van Breda: '…keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split.' It would raise the real and quite unjust prospect of inconsistent verdicts."

Why is this wrong?

Addressing paragraph [24] first: the quotation from Justice LeBel, "…keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split", has been taken out of context. That quotation comes from paragraph [124] of the judgment in which Justice LeBel is dealing with the issue of *forum conveniens*, not the issue of whether the court has jurisdiction in the first place. Both the Ontario Court of Appeal (on more than one occasion) and the Supreme Court of Canada have made it crystal clear that the factors to be considered in a *forum conveniens* argument have no bearing on the initial jurisdictional argument. The jurisdictional argument is determined first, and then only if it is determined in favour of the plaintiff are the factors relevant to *forum conveniens* considered.

The court made it quite clear in para [82] of its judgement that issues of order, fairness and efficiency are not part of the analysis in the jurisdictional inquiry:

> [82] Jurisdiction must… be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum… Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.

The Supreme Court of Canada has also made it clear that the presumptive factors are like on/off switches. The plaintiff either comes with in one of the presumptive factors (or a newly created one), or he or she does not. The court may not enter into considerations of the fairness to the plaintiff or the difficulty of dealing with multiple proceedings (unless it intends to embark on the creation of a new presumptive factor). This is clear from the quotation from paragraph [82] above, as well as parapraph [93] of the Supreme Court's decision, which reads in part, "a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system."

It is submitted that the wording in paragraph [99] of the judgment, quoted above and relied on by the court in *Cesario* refers to a situation in which the court can find that the foreign defendant fits within one of the presumptive factors for one of the causes of action properly joined in the action. Once the court finds jurisdiction with respect to the defendant with respect to one cause or action, it can then assume jurisdiction with respect to the remaining causes of action.

The court in *Cesario* attempted to take this a step further and took the position that once a court could find jurisdiction with respect to *any* defendant in an action (presumably because one of the defendants was resident in Ontario) it could then take jurisdiction with respect to all defendants.

To understand why this extension is unwarranted requires a little investigation into the history of the presumptive factors.

The initial list of presumptive factors was developed by the Ontario Court of Appeal in its decision with respect to Van Breda (*Van Breda v. Village Resorts Ltd*, 2010 ONCA 84, 98 O.R. (3d) 721). The Court of Appeal started with the list of situations in which *service ex juris* was permitted without leave in Rule 17.02 of the Rules of Civil Procedure. Of importance is that the Court expressly rejected two of those rules, 17.02(h) and 17.02(o) as presumptive factors.

Rule 17.02(o) allowed *service ex juris* "against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario".

The Supreme Court of Canada at para. [55] of its decision noted that the Ontario Court of Appeal had not accepted the situation outlined in Rule 17.02(o) to be presumptive and implicitly accepted that position by not including that fact situation in its list of presumptive factors.

So by stating in paragraph [99] that the court could take jurisdiction for all causes of action once it had found jurisdiction with respect of one, the court must have meant "all causes of action against the defendant with respect to whom it already had jurisdiction" and not "against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario" since the Ontario Court of Appeal expressly, and the Supreme Court of Canada implicitly, had already reject that as a connecting or presumptive factor.

If my analysis above is correct, then the decision in *Cesario* is wrongly decided as that was basically the only ground upon which the court found itself able to assert jurisdiction.

Finally, I feel obliged to comment on pargraph [25] of the judgment which reads:

> [25] During the course of argument, I posed to counsel a hypothetical situation which highlights the potential absurdity of who the moving party might be seeking to fall within the language of a connecting factor being "the defendant". If the facts before this court had involved a motor vehicle accident occurring in the State of New York involving a plaintiff resident in Ontario, a defendant resident in Ontario, and a defendant resident in New York State, and if the moving party was the New York resident defendant, then that party could argue that he or she not being domiciled or resident in the province clearly was not a connecting factor and Ontario should not assume jurisdiction. If on the other hand the moving party was the Ontario defendant then that defendant could argue that he or she was domiciled or resident in the province and there would be a connecting factor to Ontario. In the situation where the moving party was the New York defendant, there would be no presumptive connecting factor

> established and this would result in the inevitable splitting of the case, which is precisely what the Supreme Court of Canada intended to avoid with a multiplicity of proceedings.

The simple answer to that there is no need to split the case. Under virtually any conflict of law rules, the jurisdiction in which the tort occurred has jurisdiction in the matter. Therefore New York would have jurisdiction over all defendants and the action could proceed in New York even against the Ontario resident defendants. The reasonable and proper (and usual!) way to deal with a tort occurring in one jurisdiction with parties in multiple jurisdictions is to try the case in the jurisdiction in which the tort occurred.

Unfortunately, no appeal was taken from the decision in *Cesario*, so the ultimate determination of this issue will have to await another day.

UPDATED April 17, 2013:

Peter Danson has kindly drawn my attention to the cases of *Misyura v. Walton*, 2012 ONSC 5397 (CanLII) and *Paraie v. Cangemi*, 2012 ONSC 6341 (CanLII) which predated the *Cesario* decision by about two months.

In *Misyura*, Justice Perell stayed the action against a New York defendant, finding the court had no jurisdiction, based on reasoning similar to my reasoning above, noting

> "the circumstance of necessary parties are not presumptively connections to Ontario… Thus, even if Mr. Walton is a proper party for the main action brought by Ms. Misyura and a necessary party to the crossclaim, a presumptive connecting factor has not been established. Convenience and ad hoc notions of what is fair for Economical do not establish a connecting factor."

In, *Paraie*, Justice Lederer came to the same result with somewhat different reasoning.

UPDATED Aug. 27, 2014

See also our Commentary #23 (*Whether a UMP Defendant is a Presumptive Factor Under Van Breda - A Commentary on Taminga v. Taminga*) for a further decision of the Ontario Court of Appeal on this issue.