A Commentary on the Supreme Court of Canada Decision in Van Breda

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The Supreme Court of Canada, in *Club Resorts v. Van Breda*, 2012 SCC 17, appears to have finally settled the issue of how to determine when an Ontario court should take jurisdiction with respect to a lawsuit arising from a tort that took place in another jurisdiction.

This issue has a long and checkered history. Prior to the enactment of what were then called the "New Rules" in 1975, Ontario courts seldom took jurisdiction with respect to lawsuits against foreigners arising from torts occurring outside of Ontario. Under the old rules, a plaintiff who wished to sue a foreign defendant was required to seek leave from the court in order to serve process outside of the jurisdiction ("*service ex juris*"). The New Rules, however, provided for *service ex juris* without leave if the plaintiff could meet any one of the criteria enumerated in the subparagraphs of Rule 17.02.

In *Vile v. Von Wendt* (1979), 26 O.R. (2d) 513 at 517 (Div. Ct.), the Divisional Court held that the Rule 17.02 was intended "to enable the people of Ontario to use their own Courts more easily" and to overcome decisions under the old rule, which had required Ontario residents to pursue foreign tortfeasors elsewhere. In particular, the Divisional Court held that Rule 17.02 was substantive, and not just procedural, and as well as providing a list of when *service ex juris* was allowed without leave, it also in effect provided a list of when an Ontario court should take jurisdiction, subject to the defendant's right to convince a court that the action could be more conveniently tried in a foreign jurisdiction ("*forum conveniens*").

In particular, the court held that Rule 17.02(h) which provided for *service ex juris* whenever there was "damage sustained in Ontario" should be given a very liberal construction. For instance, a resident of Ontario injured in an automobile accident in, say, Florida, could sue a Florida resident tortfeasor in Ontario if the plaintiff's symptoms (and therefore his damages) persisted on the plaintiff's return to Ontario.

This was a much broader rule for assumption of jurisdiction than that of any U.S. state and the enforcement of it resulted in a great deal of consternation among the U.S. bar and U.S. insurers.

This issue was revisited in 2002 by the Ontario Court of Appeal 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 primary ratio was set forth in the *Muscutt* decision.

The Ontario Court of Appeal in *Muscutt* expressly held "that Rule 17.02(h) is purely procedural and does not confer jurisdiction on the court", effectively overruling the Divisional Court decision in *Vile v Von Wendt*. The court held that, as a result of intervening Supreme Court of Canada decisions (*Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077 and *Hunt v. T&N plc.*, [1993] 4 S.C.R. 289), the test for assuming jurisdiction was now the "real and substantial connection" test. The court then gave some guidance as to how to determine when the real and substantial connection test was met and set out an eight part test for doing so.

Pursuant to *Muscutt*, the onus was on the plaintiff to establish a real and substantial connection utilizing the eight part *Muscutt* test. If the plaintiff was able to establish a real and substantial connection, the onus was the on the defendant to persuade the court that Ontario was not the *forum convenience* using a slightly different seven part test.

As the case law developed after *Muscutt*, the *Muscutt* decision received much criticism as being confusing, too subjective and lacking certainty. As an example, compare the court's decision in *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.) with its subsequent decision in *Doiron v Bugge*, Docket C43361 (Oct. 2005), where the court came to the opposite result on very similar fact situations.

The court was therefore persuaded to revisit its decision in Muscutt with a five member panel in the 2010 decision of *Van Breda v. Village Resorts Ltd*, 2010 ONCA 84, 98 O.R. (3d) 721. The court took the opportunity to address the criticisms of the *Muscutt* test and clarified and reframed it to move it closer to the test in the *Uniform Court Jurisdiction and Proceedings Transfer Act* proposed by the Uniform Law Conference of Canada.

First, the Court decided to create a category-based presumptive test for assumption of jurisdiction, and in a somewhat ironic move, decided to base the presumptions on the *service ex juris* list set out in Rule 17.02, in effect almost returning to the *Vile v. Von Wendt* ratio that it had overruled in *Muscutt*. However the court now expressly excepted 17.02(h) (damage sustained in Ontario) and 17.02(o) (necessary or proper party) from the list of presumptive factors.

Further, the court held that where the presumption applied, it would be rebuttable. It would be open to a party to argue that, even though a presumptive connection existed, the real and substantial connection test had not been met, and went into some detail as to the factors that might be considered in rebutting the presumption, and how they might be weighted.

Interestingly enough, since the court held in favour of granting jurisdiction, most if not all of its comments on the criteria for refusing jurisdiction were technically *obiter dicta*.

The *Van Breda v. Village Resorts* decision was appealed to the Supreme Court of Canada which rendered its decision in the spring of 2012, *sub nomine* *Club Resorts v. Van Breda*, 2012 SCC 17. The Supreme Court upheld the Court of Appeal, but went to some considerable trouble to set out its own opinion of the proper test for assumption of jurisdiction. Although these reasons, too, are technically *obiter*, it would take a brave court to ignore them for that reason, and we can hope that this decision finally puts this issue to rest.

The Supreme Court drew a distinction between the "real and substantial connection" test as a constitutional test and as a conflicts of law test. It held it was open for the courts or legislatures of each province to adopt conflicts of law tests of their own provided that these tests did not extend the jurisdiction of a court beyond its constitutional authority. The conflicts of law tests, the court held, need not be uniform across the country.

The court set aside for another day the issue of the constitutional aspects of the real and substantial connection test and focused on the conflicts of law issues raised by the Court of Appeal. The Supreme Court noted that, Ontario, unlike many other provinces, had not legislated conflicts of law rules or adopted the CJPTA, and therefore the Ontario Court of Appeal had been left with the task of establishing a common law test. The court therefore turned to a review of the test set out by the Ontario Court of Appeal.

The Supreme Court agreed that Rule 17.02 was purely procedural and did not by itself establish jurisdiction. However, the court was concerned about the necessity of some certainty in the determination of the assumption of jurisdiction. The court therefore held that the following list of four factors were presumptive of jurisdiction:

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

If any of these connecting factors were present, the Ontario court is presumed to have jurisdiction.

However, the court made several important observations about the presumptive list:

1. The presumption is rebuttable and it is open to a defendant to rebut the presumption by showing 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 one.
2. The list of presumptive factors is not closed. It is open to a court to create a new common law presumptive factor in the appropriate circumstance.
3. If no recognized presumptive factor exists (old or new), the court does not have the discretion to assume jurisdiction based on a combination of non-

presumptive factors. In other words, unless the court is prepared to create a new category of presumptive factor, it is not open to a court to assume jurisdiction absent an existing presumptive factor.

4. The list of presumptive factors is expressly restricted to tort claims and related claims arising from tort.

Further, the court expressly rejected the proposition that the factor set out in Rule 17.02(h) (damage sustained in the province) formed a presumptive factor, so presumably it would not be open to a court in the future to add that factor to the list.

The court also noted that it expressly was not considering the effect of the doctrine of "forum of necessity" (in which the plaintiff claims that the Ontario court should take jurisdiction on the basis that there is no other available forum), so that would appear to be the only remaining situation in which a court might accept jurisdiction absent the existence of one of the enumerated connecting factors.

With respect to connecting factor (b) (carrying on business in the province) the court observed that this required more than mere advertising in the province and required some actual, not virtual presence, such as maintaining an office or regularly visiting the territory.

The court went on to agree that, even where a court otherwise had jurisdiction, it had the discretion to decline jurisdiction should the defendant convince it that Ontario was not the convenient forum. However, to do so the defendant must show that another forum is *clearly* or *exceptionally* more convenient.

The result of this decision is greatly to clarify and simplify the law of assumption of jurisdiction in tort cases.

In particular, it would seem to put an end to suits in Ontario against foreign defendants for torts committed elsewhere unless there is some contractual relationship or some presence of the defendant in the Ontario, subject only to the forum of necessity doctrine. The typical foreign motor vehicle accident will now have to be sued either in the jurisdiction in which the accident took place or the jurisdiction in which the defendant is resident.

Finally, the Rules committee may wish to consider repealing Rules 17.02(h) and (o) as they would now appear to be redundant. Even if the plaintiff could serve *ex juris* under the rule, the Ontario court would have no jurisdiction to hear the resultant lawsuit.