FTR Now

No Vacation from Justice: The SCC Rewrites the 'Real And Substantial Connection' Test

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The Supreme Court of Canada has rewritten the 'real and substantial connection' test for determining when a court can assume jurisdiction over a dispute. In *Club Resorts Ltd. v. Van Breda*, the Court created a list of 'connecting factors' that, when present, will lead to a presumption of jurisdiction and allow a court to assume jurisdiction over an action where that presumption is not rebutted (i.e. refuted). If a connecting factor is not present, a court cannot assume jurisdiction. The development of this reframed test is in response to criticisms from the bar and the bench that the application of the 'real and substantial connection' test was too discretionary. In this *FTR Now*, we discuss this significant change to the 'real and substantial connection' test and its potential importance for parties who conduct business in different jurisdictions.

THE FACTS

The case before the Court involved two actions (*Van Breda and Charron*) that were filed against Club Resorts, a Cayman Islands company.

Mr. Berg and his spouse, Ms. Van Breda, arranged through an Ottawa-based travel business to provide squash lessons at a resort in Cuba managed by Club Resorts in exchange for free accommodation. Ms. Van Breda suffered serious injuries while using a metal structure on the beach at the resort to exercise. Mr. Berg and Ms. Van Breda sued several defendants, including Club Resorts, in contract and in tort.

Dr. and Mrs. Charron booked an all-inclusive vacation that included scuba diving at a resort managed by Club Resorts. Dr. Charron drowned while scuba diving at the resort. Mrs. Charron sued several defendants, including Club Resorts, for breach of contract and negligence.

THE JUDICIAL HISTORY

Club Resorts brought a motion applying for a stay of both actions on the basis that Ontario did not have jurisdiction or, in the alternative, that it was not the most convenient forum to hear the action. In each case, the Superior Court of Justice found there was a real and substantial connection between Club Resorts and Ontario, and that Ontario was a more appropriate forum than Cuba to hear the actions. Club Resorts appealed both decisions.

The Court of Appeal heard both appeals together. It dismissed both appeals and in the process revised the real and substantial connection test. Club Resorts then successfully sought leave to appeal from the Supreme Court of Canada, which in turn also dismissed both appeals.

THE SUPREME COURT'S REVISIONS TO THE REAL AND SUBSTANTIAL CONNECTION TEST

Canadian courts have historically decided whether or not they have jurisdiction over a case by assessing whether there is a real and substantial connection between the jurisdiction and the lawsuit (including the parties to the suit). There has been significant disagreement as to how to measure whether connections are real and substantial.

In *Van Breda*, the Supreme Court of Canada held that, to meet the real and substantial connection test, the party asking a court to assume jurisdiction over an action must identify a 'connecting factor' that creates a presumption of jurisdiction. The Court outlined a non-exhaustive list of four 'presumptive' connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

- The defendant lives or resides in the province;
- The defendant carries on business in the province;
- The tort was committed in the province; and
- A contract connected with the dispute was made in the province.

The Court noted that the list of 'presumptive' connecting factors is not closed and provided courts with a list of relevant considerations to use when identifying new factors. The Court also noted that, because it was dealing in this case with a tort claim, the factors are necessarily related to that type of action but can be applied with necessary modifications to other types of claims. It was clear that courts cannot combine factors that do not appear on the above list to create a presumption of jurisdiction.

If a party successfully identifies a 'presumptive' connecting factor, it is open to the opposing party to rebut the presumption of jurisdiction by demonstrating that the connection to the jurisdiction is weak (for example, where the contract made in the jurisdiction has little or no bearing on the action).

If a court finds that a connecting factor is not present, or if the presumption of jurisdiction is rebutted, the court cannot assume jurisdiction.

CHANGES TO THE DOCTRINE OF *FORUM NON CONVENIENS*

The Court also took this decision as an opportunity to review the doctrine of *forum non conveniens*.

Once a court decides that it has jurisdiction under the real and substantial connection test, the court still has discretion to decline to exercise its jurisdiction if there is another jurisdiction that is clearly more appropriate to hear and decide the dispute. The factors considered in a forum analysis include the location of parties and witnesses and the relative strengths of the connections of the two parties.

The Court confirmed that there is a high threshold for a court to exercise its discretion to decline jurisdiction. It cautioned that once jurisdiction has been properly assumed under the real and substantial connection test, "the normal state of affairs is that jurisdiction should be exercised."

THE USE OF THE REAL AND SUBSTANTIAL CONNECTION TEST GOING FORWARD

The revision of the test by the Supreme Court of Canada should make it easier for parties to identify when a court will assume jurisdiction over a dispute involving a foreign or interprovincial party. Parties seeking to have a court hear their dispute with an out of province opponent would be well-advised to ensure that at least one of the Supreme Court's 'presumptive' connecting factors is present. By contrast, a party seeking to have an action stayed for lack of jurisdiction will need to demonstrate that none of the connecting factors apply or that they are too weak to justify assuming jurisdiction. As with all legal tests that come out of the Supreme Court of Canada, the real-world implications for employers will depend on how judges apply these principles on-the-ground. We will keep you posted.

If you have any questions regarding this decision, please contact Frank J. Cesario at 416.864.7355 or your regular Hicks Morley lawyer.

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