VAN BREDA: THE SUPREME COURT OF CANADA PROVIDES CLARITY TO CANADIAN CONFLICT OF LAWS RULES

Area of Coverage - Products Liability

It is a fact of life in the modern world that manufacturers and distributors of products often do business in multiple jurisdictions, across multiple borders. A product manufactured in one country, can be distributed and sold in another, and then used in a third in a manner giving rise to a tort claim. As a result, tort actions involving products often result in tricky cross-border, conflict of laws issues. In such cases, the forum in which the matter is heard may have significant implications in terms of the substantive and procedural law that will apply, or even the size of damage awards.

In a recent trilogy of judgments—Club Resorts Ltd. v. Van Breda, 2012 SCC 17 (“Van Breda”), Breeden v. Black, 2012 SCC 19, and Éditions Écosociété Inc. v. Banro Corp., 2012 SCC 18—the Supreme Court of Canada clarified the legal framework pertaining to Canadian conflict of laws issues. LeBel J., writing for the Court in Van Breda, dealt with two major issues. First, he clarified the “real and substantial connection” test that Canadian courts used to determine if they have jurisdiction over actions involving multiple jurisdictions. Second, he clarified the doctrine of forum non-conveniens—which is the principle in which Canadian courts exercise their discretion to decline to hear a matter on the basis that another forum would be more appropriate.

In the two companion judgments—Breeden v. Black, and Éditions Écosociété Inc. v. Banro Corp.—the Court applied the legal framework developed Van Breda in the context of two multi-jurisdictional defamation actions.

The Van Breda appeal concerned two separate cases in which individuals from Ontario, Canada, suffered catastrophic personal injuries or death while on vacation in Cuba. Actions were brought in Ontario against a number of parties, including the company that managed the Cuban hotels where the accidents occurred. The hotel corporation tried to argue that Ontario courts lacked jurisdiction, or in the alternative, that Cuban courts would be the more appropriate forum for the Actions. For both cases, the judges of first instance concluded that the Ontario courts had jurisdiction. Both cases were heard together on appeal by the Ontario Court of Appeal, which confirmed that the Ontario court had jurisdiction.
Writing for the Court, LeBel J., recognized that there was a perceived need for greater direction on how to apply the “real and substantial connection” test used by Canadian courts to determine whether they have jurisdiction. He explained that in order for the “real and substantial connection” test to provide both stability and predictability, that “this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it” (at para. 75).

As such, he held that the preferred approach in Canada was for courts to rely on a set of “presumptive factors” which would give rise to a presumption of a real and substantial connection, rather than have the courts base their decisions on what he referred to as “pure and individualized judicial discretion” (at para. 75). LeBel J. held that, in cases involving tort claims, the onus would be on the party seeking to have a court assume jurisdiction to establish the existence of some of the following “presumptive connecting factors” (at para. 90):

- the defendant is domiciled or resident 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

LeBel J. went on to find that the above list of connecting factors was not closed, and that over time courts may identify new presumptive connecting factors.

Nevertheless, the presumption of jurisdiction, observed LeBel J., could be rebutted by the defendant, who would “bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate” (at para. 81). In cases where no presumptive factor exists, or where the presumption of jurisdiction was rebutted, then the court will lack jurisdiction on the basis of there being no real and substantial connection.

LeBel J. then went on to deal with the principle of forum non conveniens. He explained that this is the principle in which—despite the existence of a real and substantial connection, and jurisdiction—the court will exercise its discretion and decline to hear a matter on the basis that another forum is more appropriate.

The onus to raise this principle lies with the parties disputing jurisdiction—they bear the burden of demonstrating that an alternative forum should be preferred and considered to be more appropriate. LeBel J. explained that “the normal state of affairs is that jurisdiction should be exercised once it is properly assumed” (at para. 109), and that determining the appropriate forum is not a “matter of flipping a coin” (at para. 109). Instead, the court should exercise its discretion to decline to hear a matter based on a conclusion that another forum “is in a better position to dispose fairly and efficiently of the litigation”.

LeBel J. then went on to apply the above principles to the facts of Van Breeda, and agreed with the lower courts that a real and substantial connection existed, and that the lower courts did not err in exercising their discretion by declining to stay the proceedings on the basis of forum non conveniens.
In sum, the Van Breda trilogy provides important guidance as to when Canadian courts will assume jurisdiction over a matter based on the real and substantial connection test. By relying on a list of objective presumptive factors, it appears as if the Supreme Court of Canada is trying to signal that the question of jurisdiction should be based on an objective determination. In addition, the Court went on to provide important guidance to as to when Canadian courts will exercise their discretion under the doctrine of forum non conveniens to decline to hear a matter despite the existence of a real and substantial connection. The Court's emphasis that the normal state of affairs is for jurisdiction to be exercised once it exists, would suggest a more restrictive exercise of discretion- focusing more on considerations of fairness and efficiency- and not simply on the fact that other forums exist in other jurisdictions.

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