



## Court of Appeal reconsiders test for jurisdiction over foreign defendants

By David N. Vaillancourt and Kenneth Dekker, Affleck Greene McMurtry LLP

In a recent decision, a five judge panel of the Court of Appeal for Ontario revised the legal test to be applied when the Ontario courts are asked to assume jurisdiction over a foreign defendant. The Court's decision in *Van Breda v. Village Resorts Ltd.* clarifies the applicable legal principles and should provide greater guidance to Ontario courts on whether and when they can properly take jurisdiction over foreign defendants.

Given the prevalence of cross-border commerce and cross-border travel, it is commonplace that parties to a legal dispute will be located across international or provincial borders. Faced with such a scenario, a plaintiff may choose to commence a proceeding in Ontario even though the defendant is not located in Ontario. The defendant, in turn, can bring a motion to stay the action on the ground that the Ontario court lacks jurisdiction.

The foundation of the test for jurisdiction remains the same both pre and post-*Van Breda*: the Ontario courts should only assume jurisdiction over a foreign defendant where the claim against that defendant has a real and substantial connection to Ontario, and where assuming jurisdiction would accord with the principles of order and fairness. While the general principles remain the same, the Court in *Van Breda* changed the mechanics of the analysis by which these general principles are applied.

### The former test for jurisdiction

Prior to *Van Breda*, the Court of Appeal's 2002 decision in *Muscutt v. Courcelles* had prescribed eight independent factors to be weighed to determine the existence of a real and substantial

connection and the needs of order of fairness in a given case. These eight factors were: (i) the connection between the forum and the plaintiff's claim; (ii) the connection between the forum and the defendant; (iii) unfairness to the defendant in assuming jurisdiction; (iv) unfairness to the plaintiff in not assuming jurisdiction; (v) the involvement of other parties to the suit; (vi) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (vii) whether the case is interprovincial or international in nature; and (viii) comity and the standards of jurisdiction, recognition and enforcement prevailing in other jurisdictions.

In recent years, many commentators in the area took issue with the factors for assuming jurisdiction that had been prescribed in *Muscutt v. Courcelles*. Common complaints included, among other things, that the test was too subjective, too complicated, and too flexible. These concerns were echoed by the Court of Appeal in *Van Breda*. The Court noted that the old test gave little or no guidance to motions judges on the relationship between the eight factors, or as to the relative weight or significance each factor should bear.

### The test for jurisdiction in *Van Breda*

In *Van Breda*, the Court of Appeal made several clarifications and modifications to the old test for jurisdiction.

- a) Presumption of jurisdiction/presumption of a lack of jurisdiction

The Court of Appeal created a new first step to the jurisdictional analysis: determining whether the type

of claim at issue presumptively has a real and substantial connection to Ontario, or whether it presumptively does not have a real and substantial connection to Ontario.

In defining these presumptions, the Court of Appeal elevated the importance of the connecting factors for extra-provincial service under Rule 17.02 of the *Rules of Civil Procedure*. Rule 17.02 provides that a plaintiff may serve an extra-provincial defendant as of right and without leave of the court if the claim falls within certain categories (e.g., claims concerning a contract formed in Ontario, claims concerning a contract that stipulates Ontario law governs any contractual disputes, and claims that concern a tort committed in Ontario, among others). If a given claim does not fall into one of the enumerated categories of Rule 17.02, the plaintiff must obtain leave of the court to commence the proceeding by extra-provincial service.

In *Van Breda*, the Court established a presumption of jurisdiction test in a fashion almost identical to the rules for extra-provincial service: those claims of a type enumerated in Rule 17.02 presumptively have a real and substantial connection to Ontario, while all other types of claims presumptively do not have a real and substantial connection to Ontario. The analysis is not identical however, as the Court of Appeal carved out two types of claims from Rule 17.02: claims where damages are sustained in Ontario, and claims where the foreign defendant is a necessary and proper party to a proceeding brought against another person who has been served inside Ontario. The Court of Appeal found that a sufficient connection will generally not exist where a plaintiff is relying solely on one of these two types of claim. Accordingly, these two types of claims are presumptively not within the jurisdiction of the Ontario courts.

The preceding presumptions are to be a starting point in the motion judge's analysis, and are capable of being rebutted based on the application of the real and substantial connection test to the specific facts of the case.

b) Demonstrating a real and substantial connection

The Court of Appeal established that the core of the real and substantial connection test is the

connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum.

In affirming the importance of the connection of the plaintiff's claim to the jurisdiction, the Court rejected the argument that the only important factor is a defendant's connection to the jurisdiction. The Court held that although the defendant's contact with the jurisdiction is an important factor, it is not a necessary factor.

In examining the connection between the forum and the defendant, the primary focus of the court will be the defendant's actions within Ontario. However, the defendant need not be physically present in Ontario where that defendant could reasonably foresee that its conduct could cause harm in Ontario.

The remaining 6 factors noted above (unfairness to the defendant in assuming jurisdiction; unfairness to the plaintiff in not assuming jurisdiction; the involvement of other parties to the suit; the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; whether the case is interprovincial or international in nature; and comity and the standards of jurisdiction, recognition and enforcement prevailing in other jurisdictions) should merely serve as analytical tools to assist the court in assessing the significance of the connections that exist between the forum, the claim, and the defendant.

c) The new test applied to the facts of *Van Breda* and *Charron*

The *Van Breda* decision incorporates two separate appeals heard at the same time stemming from two separate lawsuits (the plaintiff in one being *Van Breda*, and the plaintiff in the other being *Charron*). Coincidentally, the appealing defendant in each lawsuit was the same Caribbean resort operator, Club Resorts Limited ("CLR"). CLR is a corporation based in the Cayman Islands that operates several resorts across the Caribbean. Both lawsuits concerned injury and/or death suffered at a CLR operated resort.

Based upon the analytical framework outlined above, the Court of Appeal found that Ontario had jurisdiction over both lawsuits. The most determinative factor in the Court's analysis was that

CLR actively marketed its resorts and its vacation packages within Ontario. In the Court's view, this provided a sufficient real and substantial connection to ground jurisdiction.

It is noteworthy that the *Charron* case started with a presumption of no jurisdiction (since the claim under the *Family Law Act* by the surviving spouse concerned only damages suffered inside Ontario), while the *Van Breda* case started with a presumption of jurisdiction (since, on the facts of this case, a contract was formed between Van Breda and CLR in Ontario). In spite of the different starting point, the same result was achieved in both cases.

## Conclusion

The *Van Breda* decision provides some much-needed clarity to the test for jurisdiction in Ontario by removing from the equation several factors that should be irrelevant to whether Ontario courts have the jurisdiction to hear a particular case. *Van Breda* also brings the jurisdictional test to be applied by the Ontario courts more in line with that applied in other jurisdictions; most significantly the United States.

As in the U.S. where jurisdiction must have "minimum contacts" with a defendant,<sup>1</sup> under the test in *Van Breda* a primary consideration is now whether a foreign defendant has done something in Ontario, such as market its services or products, that makes it appropriate for it to be subject to the jurisdiction of the Ontario Courts. Where a defendant has not taken steps to market itself or otherwise undertaken any activities in Ontario, it is now very unlikely that it will have to defend litigation in Ontario. This was not clear under the former test prescribed by *Muscutt v. Courcelles*.

In addition, the Court of Appeal has clarified that the mere existence of local co-defendants to an action will not be a factor in taking jurisdiction over a foreign defendant *unless* the local defendants themselves are a connection between the foreign defendant and Ontario. For example, it will be relevant if the local defendants are agents, representatives or affiliates through which the foreign defendant sells products or offers services to Ontario residents. Under the test in *Muscutt v. Courcelles*, Ontario courts had cited the existence of local defendants and the desire to avoid a multiplicity of proceedings as the primary consideration in taking jurisdiction over claims against foreign defendants,<sup>2</sup> while at the same time Alberta and British Columbia courts found this factor to be irrelevant to their jurisdiction.<sup>3</sup> With *Van Breda*, the factors applied by Ontario courts in determining jurisdiction will now be more consistent with those applied elsewhere in Canada.

Finally, under the test in *Van Breda* the relative convenience to the parties of litigating in Ontario is no longer a consideration in determining whether Ontario courts have jurisdiction *simpliciter* over a particular action. Either the Ontario courts have jurisdiction, or they do not; it should not matter whether or not it is particularly inconvenient for a party to litigate in Ontario. *Van Breda*, quite properly, removes this factor from the jurisdiction *simpliciter* equation relegates the relative convenience to the parties to the issue of *forum non conveniens* – which involves the discretionary decision of a court that already has jurisdiction to decline jurisdiction in favour of another more convenient forum.

**Authors & Footnotes**  
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**For more information:**

David N. Vaillancourt, Affleck Greene McMurtry LLP  
Tel: 416-360-8100  
Email: [dvaillancourt@agmlawyers.com](mailto:dvaillancourt@agmlawyers.com)



Kenneth Dekker, Affleck Greene McMurtry LLP  
Tel: 416-360-6902  
Email: [kdekker@agmlawyers.com](mailto:kdekker@agmlawyers.com)

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<sup>1</sup> *World-Wide Volkswagen Corp. et al. V. Woodson et al.*, 444 U.S. 268 (U.S. S.C.)

<sup>2</sup> *M.J. Jones Inc. v. Kingsway General Insurance Co. et al.*, [2004] O.J. No. 1087 (C.A.)

<sup>3</sup> See *Deuruneft Deutsche-Russische Mineralol Handelsgesellschaft mbH v. Bullen* (2003), 37 C.P.C. (5<sup>th</sup>) 22 (Alta.Q.B.) and *Marren v. Echo Bay Mines Ltd.* (2003), 226 D.L.R. (4<sup>th</sup>) 622 (BCCA)