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Van Breda: A Revised Approach to Assumed Jurisdiction

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On "Black Friday" many American retailers are known to offer deep discounts which draw a large number of bargain hunting shoppers. But what happens if a visiting Ontario bargain-seeking motorist is injured in a collision with a New York motorist and sues them in Ontario?

The main issue is whether Ontario courts have the jurisdiction to hear an action filed by this Ontario motorist? This issue is broken down into two questions:

1) Can Ontario exercise jurisdiction? (also known as "assumed jurisdiction"); and,

2) Should Ontario exercise jurisdiction? (known as "*forum non conveniens"*).

In a recent decision, *Club Resorts Ltd v Van Breda,* 2012 SCC 17, the Supreme Court of Canada ("S.C.C.") reorganized the framework for the first question, namely whether a Court can assume jurisdiction. The first step is to determine whether there is a "presumptive connecting factor" that links the subject matter of the litigation to Ontario. The SCC lists four non-exhaustive factors:

1. The defendant is domiciled or resident in the province;
2. The defendant carries on business in the province;
3. The tort was committed in the province; and
4. A contract connected with the dispute was made in the province.

The S.C.C. specifically rejected several factors including the presence of the plaintiff and that damage has been sustained in the jurisdiction. The S.C.C. did note that new factors may be added to this list where they are analogous to the four listed above.

If a "presumptive connecting factor" is found to exist, the onus is on the defendant to rebut the presumption. However, if no recognized presumptive connecting factor (new or listed) applies, than a court should not assume jurisdiction. The S.C.C. specifically stated that jurisdiction should not be assumed on the basis of the combined effect of a number of non-presumptive connecting factors because this would lead to a return to the case-by-case discretionary approach.

It is clear from this decision that the S.C.C. it is seeking to address the uncertainty faced by all litigants with respect to jurisdictional issues. It is desirable that plaintiffs, and defendants, have a clearer set of rules for determining when it is appropriate to commence, or challenge, an Ontario action. It remains to be seen whether the lower Courts will apply this new framework in a way which creates this certainty. There are number of different scenarios which require clarification in light of this revised framework, such as claims made under the under-insured motorist endorsement of the standard Ontario Automobile Policy (OPCF-44R Family Protection Coverage). This is a particularly important scenario as most American motorists have insurance with lower policy limits than Ontario drivers.

At present, the *Van Breda* decision represents a clear policy statement from the S.C.C. that jurisdictional issues need to be determined on a principled basis as opposed to a more discretionary analysis. Insurers should not hesitate to bring motions to challenge jurisdiction in cases involving out-of-province accidents. At a minimum, such a motion should result in the production of damage documentation from the plaintiff which will enable proper Ontario claims to be resolved at an early stage.

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