Van Breda

The Supreme Court of Canada Provides Clarity to Conflict of Laws Rules

By Sandra L. Corbett and Ryan P. Krushelnitzky

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. Justice LeBel, writing for the Court in *Van Breda*, dealt with two major issues. First, he clarified the "real and substantial connection" test that Canadian courts use to determine if they have jurisdiction over actions involving multiple jurisdictions. Second, he clarified the doctrine of forum non-conveniens—which permits Canadian courts to 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 in *Van Breda* in the context of two multijurisdictional 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. The Ontario Court of Appeal heard the appeals of both cases together and confirmed that the Ontario court had jurisdiction.

Writing for the Court, Justice LeBel recognized a perceived need for greater direction on how to apply the "real and substantial connection" test used by Canadian courts to determine whether they had jurisdiction. He explained that for the "real and substantial connection" test to provide both stability and predictability "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." *Van Breda*, 2012 SCC 17, 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." *Id.* Justice LeBel held that in cases involving tort claims the party seeking to have a court assume jurisdiction would bear the onus to establish that some of the following "presumptive connecting factors" existed:

- 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.

Van Breda, 2012 SCC 17, para. 90.

Justice LeBel went on to find that the above list of connecting factors was not a finite list, and over time courts could identify new presumptive connecting factors.

Nevertheless, a defendant, or a party opposing jurisdiction, could rebut the presumption of jurisdiction, observed Justice LeBel, and 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." *Van Breda*, 2012 SCC 17, para. 81. In cases without a presumptive

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factor, or when the presumption of jurisdiction was rebutted, then the court would lack jurisdiction because no real and substantial connection would exist.

Justice LeBel 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—a 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 is preferable and considered more appropriate. Justice LeBel explained that "the normal state of affairs is that jurisdiction should be exercised once it is properly assumed." *Van Breda*, 2012 SCC 17, para. 109. Determining the appropriate forum is not a "matter of flipping a coin." *Van Breda*, 2012 SCC 17, para. 109. Instead, a 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."

Justice LeBel then applied the above principles to the facts of *Van Breda* and agreed with the lower courts that a real and substantial connection existed, and 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 about 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 that the Supreme Court of Canada wishes to signal that Canadian courts should decide these jurisdictional questions based on objective determinations. In addition, the Court provided important guidance about 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 normally a court would exercise jurisdiction once it exists would suggest a more restrictive exercise of discretion focused on fairness and efficiency and not simply on the fact that other forums exist in other jurisdictions. FD