

Blakes Bulletin

Litigation & Dispute Resolution

Ontario Court of Appeal Reformulates Test for Jurisdiction over Foreign Defendants in Ontario Proceedings

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The test for when Ontario courts will assume jurisdiction over foreign-based defendants has been modified by the recent decision of the Ontario Court of Appeal in *Van Breda v. Village Resorts Limited (Van Breda)*.

To understand the import of *Van Breda*, it is useful to briefly look at the pre-existing law on assumption of jurisdiction over foreign-based defendants. A Canadian court can assume jurisdiction *simpliciter* over a foreign defendant who has not agreed or attorned to the province's jurisdiction where there is a "real and substantial" connection between the Canadian province and the action. Even where a court determines that it has jurisdiction because a real and substantial connection exists, it can still decline to exercise jurisdiction if it is of the view that there is another jurisdiction better suited to the trial of the issues, or, put another way, if it decides that Ontario is a *forum non conveniens*.

PREVIOUS TESTS FOR JURISDICTION SIMPLICITER AND FORUM CONVENIENS: MUSCUTT

For the past seven years, the tests for jurisdiction *simpliciter* and *forum conveniens* in Ontario were as set out in the leading case of *Muscutt v. Courcelles (Muscutt)*. In *Muscutt* and four companion cases released at the same time, the Ontario Court of Appeal crafted a non-exhaustive list of eight factors to be applied in determining whether the court should assume jurisdiction over an out-of-province defendant:

1. The connection between the forum and plaintiff's claim
2. The connection between the forum and defendant
3. Unfairness to the defendant in assuming jurisdiction
4. Unfairness to the plaintiff in not assuming jurisdiction
5. The involvement of other parties to the suit

6. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis
7. Whether the case is interprovincial or international in nature
8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

If a court determined it had jurisdiction, *Muscutt* enumerated a further set of non-exhaustive factors to be considered in determining whether Ontario was *forum non conveniens*:

- the location of the majority of the parties
- the location of key witnesses and evidence
- contractual provisions that specify applicable law or accord jurisdiction
- the avoidance of a multiplicity of proceedings
- the applicable law and its weight in comparison to the factual questions to be decided
- geographical factors suggesting the natural forum
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

NEW TEST FOR JURISDICTION SIMPLICITER: VAN BREDA

Following *Van Breda*, the first issue for a court to consider is whether or not the claim falls within the rules for service of the claim outside of Ontario. A claim can be served outside the province in a number of circumstances set out in Rule 17.02 of the *Rules of Civil Procedure*. If the claim falls within the listed categories in Rule 17.02, with two significant exceptions, there is a presumption that the Ontario court has jurisdiction. Notably, the presumption will not arise if the only basis on which the plaintiff claims to be able to serve the claim outside of Ontario is either: (i) because it suffered damages within Ontario as the result of, for example, a tort or breach of contract committed elsewhere (pursuant to subrule 17.02(h)); or, (ii) because the

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foreign defendant is a necessary or proper party to a claim properly brought against a defendant served in Ontario (pursuant to subrule 17.02(o)).

Whether there is a presumption that the Ontario court has jurisdiction or not, it remains for the court to decide whether there is actually a real and substantial connection between the action and Ontario on the facts of the particular case. In answering this question, the eight factors in *Muscutt* have now been reduced to two: whether or not there is a connection between Ontario and the claim, and between Ontario and the defendant (these were factors 1 and 2 from *Muscutt*). When considering the connections between Ontario and the defendant, the focus will be on acts done by the defendant within Ontario, though physical presence within the jurisdiction is not required. For example, where a defendant has put a product into the "normal channels of trade" and ought to know that the product will be used, and could cause damage, in Ontario, jurisdiction may be assumed. The courts will assess whether the defendant "participated in something of significance or was actively involved in" Ontario.

The remaining six *Muscutt* factors will no longer be viewed as independent factors of equal weight, but as general legal principles "to assist the court in assessing the significance of the connections between the forum, the claim and the defendant". In particular, consideration of fairness to the parties (formerly *Muscutt* factors 3 and 4) should be considered as a whole and applied "as an analytic tool to assess the relevance, quality and strength" of the connections between the claim and/or the defendant and Ontario, to determine whether those connections amount to a real and substantial connection and if assuming jurisdiction accords with the principles of order and fairness. Any alleged unfairness to a plaintiff in refusing jurisdiction cannot "trump" the lack of a real and substantial connection. *Muscutt* factors 6 to 8, which dealt with comity considerations, are to be considered as principles of private international law which will assist in the analysis, and not as independent factors.

Notably, the Court of Appeal also endorsed the concept of the "forum of necessity" as an exception to the real and substantial connection test. Therefore, in truly exceptional cases "where there is no other forum in which the plaintiff could reasonably seek relief" the court may assume jurisdiction over the proceeding – and a foreign defendant – in the absence of a real and substantial connection to Ontario.

Forum Conveniens

Van Breda has not changed the factors to be considered in the *forum conveniens* analysis. The Court has underscored, however, that the *forum conveniens* considerations are separate and apart from the jurisdiction *simpliciter* analysis. This is in response to criticism that the *forum conveniens* analysis almost inevitably follows the same course as the jurisdiction analysis (i.e., if an Ontario court accepts jurisdiction it usually finds that Ontario is the *forum conveniens*).

CONCLUSION

It is early to say whether *Van Breda* will result in more or less actions against foreign-based defendants being tried in Ontario. Generally speaking, where the *Rules of Civil Procedure* permit service abroad, it seems likely, given the presumption, that Ontario courts will assume jurisdiction. On the other hand, where the claim does not fit within the categories enumerated, the courts may be less inclined to assert jurisdiction. In all cases, it appears that the courts now will focus on what always should have been the main issue, which is what, if anything, the defendant has done to bring itself within the jurisdiction of an Ontario court.

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