

New Canadian Framework for Assumption of Jurisdiction

After 13 months the Supreme Court of Canada has finally released its decisions in four appeals on the issue of the taking and exercising of jurisdiction. The main decision is in *Club Resorts Ltd v Van Breda* (available here) which deals with two of the appeals. The other two decisions are *Breeden v Black* (here) and *Editions Ecosociete Inc v Banro Corp* (here).

The result is perhaps reasonably straightforward: in all four cases the court upholds the decisions of both the motions judges and the Court of Appeal for Ontario. All courts throughout held that Ontario had jurisdiction in these cases and that Ontario was not a *forum non conveniens*.

The reasoning is more challenging, and it will take some time for academics, lawyers and lower courts to work out the full impact of these decisions. The court's reasoning differs in several respects from that of the courts below.

The court notes that a clear distinction needs to be drawn between the constitutional and private international law dimensions of the real and substantial connection test. This is an interesting observation, particularly in light of the fact that the court's own decision is not as clear on this distinction as it could be. I expect that going forward there will be different interpretations of what the court is truly saying on this issue.

The court is reasonably clear that the real and substantial connection test should not be used as a conflicts rule in itself. It is not a rule of direct application. Rather, it is a principle that informs more specific private international law rules governing the taking of jurisdiction. This is a change from the approach used by provincial appellate courts, especially the Court of Appeal for Ontario, which arguably had been using the real and substantial connection test as its rule, at least in part, for establishing jurisdiction in service *ex juris* cases.

The court states that it is establishing the framework for the analysis of jurisdiction. Going forward, a real and substantial connection must be found through a "presumptive connecting factor" which is a factor that triggers a presumption of such a connection. The presumption can be rebutted. If the

plaintiff cannot establish such a presumption, the court cannot take jurisdiction. This last point is perhaps the largest change made to the law. On the law as it stood, the plaintiff could establish jurisdiction through a variety of non-presumptive factual connections that collectively amounted to a real and substantial connection to the forum. That approach is rejected by the Supreme Court of Canada.

The court does not purport to set out a complete list of presumptive connections. It confines itself to identifying some such connections that could apply in tort cases, namely that (a) the defendant is domiciled or resident in the forum, (b) the defendant carries on business in the forum, (c) the tort was committed in the forum, and (d) a contract connected with the dispute was made in the forum. It is quite open, on the language in the decisions, as to what other presumptive connections lower courts will need to be finding in other cases. One possible solution is that lower courts will largely continue to follow the recent approach of the Court of Appeal for Ontario that the enumerated bases for service *ex juris*, subject to some exceptions, amount to such presumptive connections.

The decisions also address the test for the doctrine of *forum non conveniens*. Three points can be made about that analysis. First, the language suggests the burden is always on the defendant/moving party. Second, emphasis is placed on “clearly” in “clearly more appropriate”, suggesting that it will be harder to displace the plaintiff’s choice of forum. Third, the court cautions against giving too much weight to juridical advantage factors. Judges should avoid invidious comparisons across forums and refrain from “leaning too instinctively” in favour of the judge’s own forum.

The decisions are not a radical break with the earlier cases but they do change the law on taking jurisdiction in several respects. In addition, the court makes several points along the way, as asides, that will impact other aspects of the conflict of laws. For example, the court confirms the propriety of taking jurisdiction based on the defendant’s presence in the forum.