# Supreme Court of Canada Evolves Test for Taking Jurisdiction

The Supreme Court of Canada has released its decision in *Lapointe Rosenstein Marchand Melancon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 (available here). The decision builds on the court's foundational decision in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, which altered the law on taking jurisdiction in cases not involving presence in the forum or submission to the forum.

In *Club Resorts* the court held that to take jurisdiction in service *ex juris* cases the plaintiff had to establish a presumptive connecting factor (PCF) and it identified four non-exhaustive PCFs for tort claims. The fourth of these was that a contract connected with the dispute was made in the forum. This was viewed as unusual: there was very little precedential support for considering such a connection sufficient to ground jurisdiction in tort cases. Commentators expressed concern about the weakness of the connection, based as it was on the place of making a contract, and about the lack of a clear test for determining whether such a contract was sufficiently connected to the tort claim. Both of these issues were squarely raised in *Lapointe Rosenstein*.

The majority (6-1) agreed with the motions judge and the Court of Appeal for Ontario that this PCF was established on the facts of this case. Justice Cote dissented, concluding both that the contract was not made in Ontario and that it was not sufficiently connected with the tort claim.

The facts are somewhat complex. After the 2008 financial crisis the Canadian government bailed out General Motors of Canada Ltd (GM Canada). In return for this financial support, GM Canada agreed to close dealerships (ultimately over 200) across Canada. Each dealership being closed was compensated under a Wind-Down Agreement (WDA) between GM Canada and the dealer. The WDA was governed by Ontario law and contained an exclusive jurisdiction clause for Ontario. The WDA required each dealer to obtain independent legal advice (ILA) about the consequences of signing the WDA.

Some time after the dealerships closed over 200 dealers brought a class action in

Ontario against GM Canada disputing the legality of the WDAs. They also sued Cassels Brock & Blackwell, the lawyers for the Canadian Automobile Dealers Association, for negligent advice to the dealers. In turn, Cassels Brock brought third-party claims against 150 law firms which had provided the ILA to the dealers. Many of the law firms, including those in Quebec, challenged the court's jurisdiction over the third-party claim. Cassels Brock argued that the WDAs were contracts made in Ontario and that the WDAs were connected with the tort claim Cassels Brock was advancing in the third-party claim (which was for negligence in providing the ILA).

The court had the chance to adjust or move away from this PCF, given the criticism which it had attracted (see para 88). But it affirmed it. Worse, the Court of Appeal for Ontario had at least expressed a willingness to be flexible in determining the place of making of the contract (which in part got around the central weakness in this PCF). In contrast the majority stresses the "traditional rules of contract formation" (para 31). Insisting on the traditional rules is what gives rise to the core difference between the majority (Ontario: paras 42-43) and the dissent (Quebec: paras 74-80) on where the WDAs were made. Those rules mean the dissent is right to point out (para 81) that related connections between the WDAs and Ontario (such as the applicable law and the jurisdiction clause: see para 48) do not, strictly speaking, have anything to do with where the contract is made and so must be ignored on that issue. The more robust approach of the Court of Appeal allows more to be assessed and thus for an easier (more consensual) conclusion that the WDAs were "made" in Ontario. There is reason to be quite concerned that the Supreme Court of Canada's approach will lead to more disputes about where a particular contract has been made, focusing on technical rules, which is unwelcome.

The court also splits on whether the contract, if made in Ontario, is connected to the tort claim. I am inclined to think the majority gets it right when it finds that it is. Note, though, that I think it is wrong to claim, as the majority does (para 47 last sentence), that somehow the law firms were brought "within the scope of the contractual relationship" by providing the advice about it. The best part of the dissent is the demolition of that claim (para 86). The real problem is that a close enough connection should be available to be found even in the absence of bringing the defendant "within" that contractual relationship. This PCF, if the misguided narrow focus on place of contracting could be overcome, can be

broader than that and thus broader than the dissent would make it (para 87).

Here a local Quebec law firm is asked by its local client to provide it with advice about the client's entering into the WDA. The terms of the WDA expressly say that to so enter into it the client has to get that advice. The WDA is clearly very connected to Ontario. It seems to me right to say that the WDA is a contract related to any subsequent negligent advice claim the client would advance against the firm. The WDA is not just context, bearing peripherally on the advice. The advice entirely centers on the WDA and whether the client should enter into it. The WDA is what the advice is about. The majority gets all of this right in para 47 except for its last sentence. Of the 11 judges who addressed this issue in the three levels of court, only Justice Cote finds the connection between the contract and the tort claim to be insufficient.

So I think the decision is right but the majority errs by stressing the traditional rules of contract formation for assessing the place of making and by using the "within the scope of the contractual relationship" test for the requisite connection.

Some smaller points:

1. I am somewhat puzzled by the idea (para 31) that parties would expressly think about how they would go about making their contracts so as to have them made in a particular place so as to get to subsequently take advantage of this PCF. Do parties think like that? Did they before this PCF was created? I suppose it is easier to say they now do think like that since they are being told to do so by the court.

2. For future debates about where contracts are made, I worry about some of the court's language. One example is para 40's reference to where the acceptance "took place". Is that compatible with the postal acceptance rule which looks, for some contracts, at the place of posting rather than place of receipt? Would we say the acceptance in such a case "took place" at the place of posting? See in contrast para 73.

3. Justice Cote's dissent could be seen as a covert attempt to eliminate this PCF. She insists on a very tight connection between the contract and the tort claim. She refers to circumstances in which "the defendant's breach of contract and his tort are *indissociable*" (para 95; emphasis in original) and states that this PCF

"only provides jurisdiction over claims where the defendant's liability in tort flows immediately from the defendant's own contractual obligations" (para. 90). In such cases, this PCF (tied to the place of contracting) might safely be abolished and replaced with other, better PCFs relating to tort and contract claims (especially in light of para 99 of *Club Resorts*). It would not be needed for the court to be able to take jurisdiction, as it was on the facts of *Club Resorts* and *Lapointe Rosenstein*. I am sympathetic to a desire to eliminate this PCF, but I think that result needed to be confronted directly rather than indirectly. In the wake of the majority decision, it is now unlikely to happen at all.