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Canada Update: A New Framework for Determining Jurisdiction, the Application of the Doctrine of Forum Non Conveniens, and Limitations of the Solicitor-Client Privilege

David Paulson

CANADA UPDATE: A NEW FRAMEWORK FOR DETERMINING JURISDICTION, THE APPLICATION OF THE DOCTRINE OF *FORUM NON CONVENIENS*, AND LIMITATIONS OF THE SOLICITOR-CLIENT PRIVILEGE

*David Paulson**

THIS update focuses on two issues that have strong implications to their respective areas of law. First, the Supreme Court of Canada (the Court) introduced a modified framework for determining whether a court has sufficient personal jurisdiction over a foreign defendant to hear a tort claim. As a necessary corollary, these cases also address the doctrine of *forum non conveniens* and its application to these claims. Second, the British Columbia Court of Appeals recently ruled on the question of whether trust account ledgers fall under the solicitor-client privilege. The decision is helpful to understanding the current limits of the privilege.

I. A FRAMEWORK FOR ANSWERING THE QUESTIONS OF JURISDICTION AND *FORUM NON CONVENIENS*

In a series of recent decisions the Court clarified the factors other courts should look at to determine jurisdiction, and what courts should consider in applying the discretionary doctrine of *forum non conveniens*.[1] This simplified approach will make it easier for plaintiffs to determine if the court has jurisdiction to hear their case and make for more uniform decisions regarding jurisdiction. A brief history of how the court has handled the questions of jurisdiction, choice of law, and the doctrine of *forum non conveniens* is necessary to understand just how important these recent cases are to the development of these doctrines.

The Court began the shift towards the current approach in 1990, when it held that to have jurisdiction the tortious act in question must have

* David Paulson is a third-year law student at SMU Dedman School of Law. He is currently serving as the student Reporter on Canada for the International Law Review Association. He would like to thank his family and friends for the support they have given him during his time in law school.

1. Breeden v. Black, 2012 SCC 19 (Can.); Éditions Écosociété Inc. v. Banro Corp., 2012 SCC 18 (Can.); Club Resorts Ltd. v. Van Breda, 2012 SCC 17 (Can.).

some connection to the jurisdiction and the court where the action is being brought.[2] While *Morguard Investments Ltd. v. De Savoye* dealt with the enforcement of a judgment in Alberta over a defendant who had been served in British Columbia, it is the general basis for the Canadian application of the "real and substantial connection test," and was extended to apply to international jurisdictions as well.[3]

This idea of a real and substantial connection was further developed a few years later in *Tolofson v. Jensen* when the Court held that, in accordance with the doctrine of *lex loci delicti*, if the act occurred within Canada a court should apply the substantive law of the place where the injury occurred.[4] But, the Court noted that in cases involving international law a judge may exercise discretion if the application of the law of the country where the injury occurred would work an injustice.[5]

Until recently, the trend since *Morguard* has been to first clarify choice of law and jurisdictional issues among the provinces then apply these principles to answer the same questions as they arise in international litigation. This is highlighted by dicta that comments on how these rules should apply to international litigation when the facts are limited to merely a question of whether the case should be brought in one province or another.[6]

While the idea of a "real and substantial connection test" has been alive in Canadian jurisprudence for over thirty-five years, it was not until this year that the Court clarified a framework for applying it.[7] Prior to these recent decisions from the Court, the burden of interpretation rested on the provinces. All of the provinces except Ontario passed statutes in an attempt to develop a framework for determining when the "real and substantial connection test" is satisfied.[8] These statutes have been largely based off of the Uniform Court Jurisdiction and Proceedings Transfer Act.[9] Ontario has, however, made similar changes through its Rules of Civil Procedure and common law.[10]

All of these attempts to clarify what the Court meant by a real and substantial connection have resulted in a series of factors that a court should consider and weigh to determine whether it has jurisdiction.[11] While some of the statutes have listed other factors that establish jurisdiction, they include as a factor, that "there is a real and substantial connection between the Province and the facts on which the proceeding against

2. Morguard Invs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 1106-07 (Can.).
3. Evan Atwood & Malcolm N. Ruby, *Supreme Court Simplifies and Clarifies Assumption of Personal Jurisdiction*, GOWLINGS (Apr. 2012), http://www.gowlings.com/knowledgecentre/article.asp?pubID=2515&bp=f.
4. Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 1024-25 (Can.).
5. *Id.* at 1029.
6. *See, e.g., id.* at 1069.
7. Club Resorts Ltd. v. Van Breda, 2012 SCC 17, paras. 22, 24 (Can.).
8. *Id.* at paras. 40-43.
9. *Id.*
10. *Id.*; Muscutt v. Courcelles, [2002] 60 O.R. 3d 20, para. 3 (Can. Ont. C.A.).
11. *See, e.g., Muscutt*, [2002] 60 O.R. 3d at para. 41.

that person is based."[12] In short, courts and legislative bodies have been struggling to apply a concept that the Court propounded but never clearly defined.

The Ontario Court of Appeals attempted to give some clarity to the "real and substantial connection test" by listing eight factors, similar to the statutes of the other provinces, which should be weighed to determine if the court has jurisdiction.[13] It is against this backdrop of various statutes and common law that the Court has finally given clarity to the question of jurisdiction.

A. A Modified Framework for Assumption of Jurisdiction: A Reworking of *Muscutt* and the New *Van Breda-Charron* Approach

A combination of two cases before the Court, where the injuries occurred in Cuba, was the conduit for the new framework. The Court, in *Club Resorts Ltd. v. Van Breda*, listed four factors that create a rebuttable presumption for jurisdiction.[14] An interesting aspect of the case is that it directly answers how this test is applied to international jurisdiction, a question of whether a case should be brought in Cuba or Ontario, rather than merely whether it should be brought in one province or another. Shortly after this case, the Court applied the same test set out in *Van Breda* to a dispute involving a question of whether the suit should be brought in Ontario or Quebec.[15]

1. The Presumptive Factors

The four factors, individually or in combination, that the Court held create a rebuttable presumption of jurisdiction are "(a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province."[16]

While the Court uses the conjunctive "and" in listing the factors, rather than "or," the Court makes it readily apparent that only one factor is necessary to create the rebuttable presumption.[17] One should be careful to recognize that these factors are specifically applied to tort cases.[18] While there is a chance that they may be expanded to other areas of the law, such as contract disputes, the Court is clearly not addressing that question at the moment.[19] But the Court does mention that if the injury sounds in both contract and tort, then both actions may proceed if juris-

12. *See, e.g.*, Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003, c. 2, s. 4(e) (Can.).
13. *Muscutt*, [2002] 60 O.R. 3d at paras. 76-110.
14. Club Resorts Ltd. v. Van Breda, 2012 SCC 17, para. 90 (Can.).
15. Éditions Écosociété Inc. v. Banro Corp., 2012 SCC 18, para. 1 (Can.).
16. *Van Breda*, 2012 SCC 17 at para. 90.
17. *Id.* at para. 100.
18. *Id.* at para. 85.
19. *See id.*

diction for the tort cause of action is established by a presumptive factor.[20]

The Court also emphasizes that this list of four factors is not conclusive and states that when "identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors."[21] Additionally, a court should consider how the new presumptive factor is treated in case law, statutes, and the international law of other similar legal systems.[22]

Perhaps even more interesting is the power of the presumptive factors. The Court holds that if a new or existing presumptive factor is not found, then a court should not assume jurisdiction on some other basis, such as an aggregate effect of non-presumptive factors.[23] But if a presumptive factor exists, a court may only decline jurisdiction if that presumption is rebutted or if the defense objects on the basis of *forum non conveniens*.[24]

2. *The Rebuttable Nature of the Factors*

The Court goes into some detail regarding what is required to overcome the presumption, and holds that if the presumption "does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them" then the presumption is rebutted.[25] This effectively understates the difficulty in rebutting the presumption. To put this in context, in one of the cases based on an injury that happened in Cuba, the plaintiff moved to Calgary after the injury and then to British Columbia, where the majority of her pain and suffering occurred, and finally brought suit in Ontario.[26] The basis for jurisdiction was a contract that a travel agent, whom the court found to be an agent of the resort based on a contractual relationship, executed with the plaintiff's husband; the contract gave them free room and board in exchange for the husband conducting tennis lessons during their stay.[27] This contractual relationship is one of the presumptive factors.[28] But if this meager relationship to Ontario is not rebutted by the fact that the injury and everything else that birthed from this injury occurred in other jurisdictions, the question raised is whether anything short of disproving the existence of the factor will be enough to meet the burden that the defendant has in rebutting the factor. A defendant will likely not find it any easier to avoid jurisdiction by attempting to invoke the doctrine of *forum non conveniens*.

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20. *Id.* at para. 99.
21. *Id.* at para. 91.
22. *Id.*
23. *Id.* at para. 93.
24. *Id.* at paras. 98, 102.
25. *Id.* at para. 95.
26. *Id.* at para. 114.
27. *Id.* at para. 115.
28. *Id.* at para. 90.

B. THE EXERCISE OF JURISDICTION: *FORUM NON CONVENIENS*

The question of jurisdiction and the doctrine of *forum non conveniens* are two separate issues, an important point not to miss.[29] Once one of the presumptive factors is conclusively established, then the defendant has the burden of raising and proving why a court should refuse jurisdiction.[30] This is a heavy burden that the defendant must overcome. The defendant must prove that the alternate forum can properly exercise jurisdiction under the same presumptive factor test, and that the alternate forum is "clearly more appropriate."[31] Remember the fact that the proceedings have already been initiated at this point. So the other forum would have to be so much more appropriate that it would justify the termination of the current proceedings and forcing the plaintiff to start over in the preferred forum.

1. The Factors to be Considered and Judicial Discretion Permitted

The Court reiterates that there is not an exhaustive list of items a court should consider, but lists six factors drawn from the Uniform Court Jurisdiction and Proceedings Transfer Act to illustrate the types of things a court should be thinking about in making this decision. They include "the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum" and "the law to be applied to issues in the proceeding" as well as considering whether a judgment would likely be enforced, "avoiding conflicting decisions," and avoiding multiple judgments.[32]

The Court goes on to point out that courts and statutes have used the words "clearly" and "exceptionally" to describe this doctrine and this should not be ignored.[33] It should not be a matter of just picking between two equally good forums. The court should only find the alternate forum is more appropriate in situations where the other jurisdiction is actually in a better position to hear the case.[34]

This sounds like a potential conflict of interest, with the judge deciding the question whether another judge would be in a "better position to dispose fairly and efficiently of the litigation" before the court refuses the case under the doctrine of *forum non conveniens*.[35] The Court readily acknowledges this conflict by noting that the presumptive factors create a rather low threshold for establishing jurisdiction, and a judge should be cognizant of this in making the determination.[36]

The standard of review is also important; that the trial court's decision will be given deference and, "absent an error of law or a clear and serious

29. *Id.* at paras. 101, 109.
30. *Id.* at paras. 102-03.
31. *Id.* at para. 103.
32. *Id.* at para. 105.
33. *Id.* at paras. 108-09 (internal quotation marks omitted).
34. *Id.* at para. 109.
35. *Id.*
36. *Id.*

error in the determination of relevant facts," the lower court's decision will stand.[37]

C. The Limitations of Jurisdiction

The limits of this new test based on presumptive factors are not entirely clear, but in some cases the assertion of jurisdiction may be quite alarming on first glance. In *Breeden v. Black*, a case decided shortly after *Van Breda*, the Court ruled on the question of jurisdiction as it was applied in the context of a suit for defamation.[38] The case involved a well-established businessman from Canada who was also chairman of a U.S. corporation.[39] There had been questionable payments made to the plaintiff in his position as chairman.[40] The corporation formed a committee to investigate and subsequently issued a report and press releases on the company's website in the United States that detailed the findings.[41] Some of the press releases appear to have included "contact information directed at Canadian media."[42] Nevertheless, because the tort of defamation occurs upon publication, when three Canadian newspapers republished the information contained in the report and press releases, this resulted in the tort occurring in Ontario.[43] As would be expected, the defense contends that the plaintiff is a "libel tourist" and asserts that jurisdiction is improper, and, even if jurisdiction is proper, American law should be applied.[44]

Based on the presumptive factor involving where the tort was committed, the Court found jurisdiction.[45] The Court further found that the forums of Illinois and Ontario were equally appropriate and after finding that many of the factors favored a proceeding in Illinois, the Court held that the defendants had not met the burden of proving an Illinois court would be "clearly" superior.[46] When considered in light of the facts that the plaintiff was currently incarcerated in Florida, no longer a citizen of Canada, and that the overwhelming majority of the defendants are not Canadian residents, this case should not be ignored—even more so as a result of the holding that the law of Ontario will apply.[47]

D. Class Action Implications

Some have questioned the implications of these decisions as they relate to class action suits.[48] This is perhaps one of the most interesting implica-

37. *Id.* at para. 112.
38. *See* Breeden v. Black, 2012 SCC 19 (Can.).
39. *Id.* at para. 3.
40. *Id.* at para. 6.
41. *Id.*
42. *Id.* at para. 5.
43. *Id.* at paras. 11, 18.
44. *Id.* at paras. 15-16.
45. *Id.* at para. 20.
46. *Id.* at para. 29.
47. *Id.* at paras. 31-32.
48. Atwood & Ruby, *supra* note 3.

tions of these rulings, and when considered in light of something such as the new anti-spam law, one can only wonder just how much liability some companies are exposing themselves to without even knowing it.[49] But, the reality of the effect on class actions may already be hinted at in the recent rulings.

In *Van Breda* the Court highlights the fact that cases sounding in tort and contract may establish jurisdiction based on the presumptive connecting factor of the tort.[50] When this is combined with the low threshold for meeting the presumptive factor, the Court appears to be leaning towards a finding of jurisdiction in any suit where one plaintiff could establish that a presumptive factor is met. To require that all of the plaintiffs must establish a connecting factor would simply be inefficient and possibly result in effectively separating the class into different jurisdictions, to have their cases tried as separate classes. These recent cases reflect that if a reasonable argument can be made for jurisdiction by establishing any one of the presumptive factors a court will likely find jurisdiction.

If the plaintiff is denied jurisdiction it will more likely be on the basis of *forum non conveniens*. And after the case of *Breeden v. Black*, plaintiffs are less likely than ever to be denied jurisdiction on this basis.

E. Conclusion

The test for jurisdiction started out focused on a real and substantial connection and then the Court moved to a more defining framework of presumptive factors; establishing a rebuttable presumption that a real and substantial connection exists. This probably resulted in a lower threshold for finding jurisdiction, or at least indicates that the threshold never should have been very high. More importantly, the new framework does much to clarify the question of jurisdiction for all parties, ensure consistent decisions, and increase judicial efficiency.

Equally important is the Court's approach in determining whether another jurisdiction would clearly be a more appropriate forum. While "clearly more appropriate" is a somewhat ambiguous standard, and may appear to be a difficult burden for a defendant to meet, it is not an impossibly high standard. Further, this is not an extraordinary burden in light of the laws of other countries; it is close to the same standard the United States has used for over three decades.[51] And in a case where the plaintiff appears to be forum shopping, a court will likely take a much closer look when weighing the factors and deciding if there is a clearly superior

49. *See* Catherine Dunn, *New Law Takes Canadian Spam Off the Marketing Menu*, Law.com (May 21, 2012), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202555130527&New_Law_Takes_Canadian_Spam_Off_the_Marketing_Menu. This new law has not yet taken effect, but will provide for significant fines as well as a private right of action against companies who send, with a few exceptions, emails to people who have not consented to receive them. Class action potential is definitely present, and foreign corporations will likely be open to suit.

50. Club Resorts Ltd. v. Van Breda, 2012 SCC 17, para. 99 (Can.).

51. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241-42 (1981).

forum. But whatever the decision of the trial court, it will probably not be overturned in the vast majority of instances.

II. ACCOUNTING RECORDS AND THE SOLICITOR-CLIENT PRIVILEGE

Canada, on the whole, has a very broad and strong solicitor-client privilege. In fact, it has moved beyond that which is merely an evidentiary or procedural rule and has been embraced as a substantive rule of law.[52] The privilege is nearly absolute, but there are limitations and rulings that enforce that these limitations should not be interpreted as eroding the attorney-client privilege. Rather, these decisions stand as sentinels protecting the privilege, which is to serve the public as a whole, from being used for other purposes. This section is concerned specifically with what falls within or outside of the privilege and will not address in any detail the exceptions to an established privilege, such as the crime-fraud exception.

Fundamentally, the privilege protects communications made for the purpose of obtaining legal advice.[53] While this sounds simple enough to figure out, it gets complicated when you have facts or acts that are clearly not communications, but that, if disclosed, would reveal the underlying communication.[54] Because of the possibility that raw data, such as fees, could lead to the collateral disclosure of client information, the Court held, nearly a decade ago, that there is a rebuttable presumption of privilege that is attached to these ancillary facts.[55]

Against this backdrop, the British Columbia Court of Appeals had to address the question of solicitor-client privilege as it relates to trust accounts.[56] The court reiterated the fact that there is no bright line dividing what constitutes a communication subject to privilege and a non-privileged fact.[57] Rather, the privilege depends on the relationship of the fact to the communications made in seeking legal advice.[58]

In this case, the court found that the privilege did not apply to four ledger entries where money was moved in and out of the trust account for purposes of investment in a real estate transaction.[59] The court reasoned these matters related to money management, as it was for the purpose of an investment, and it had no relation to communications made for the purposes of obtaining legal advice.[60] In this case, the lawyer stated that he gave the client legal advice regarding every entry in the ledger. It is

52. *E.g.*, Maranda v. Richer, [2003] 3 S.C.R. 193, para. 12 (Can.); Donell v. GJB Enter., Inc., 2012 BCCA 135, para. 34 (Can.).
53. *See, e.g., Donell*, 2012 BCCA 135 at para. 35.
54. *Maranda*, [2003] 3 S.C.R. at paras. 27-30.
55. *Id.* at paras. 33-34.
56. *See Donell*, 2012 BCCA 135.
57. *Id.* at para. 55.
58. *Id.* at paras. 55, 63.
59. *Id.* at para. 66.
60. *Id.*

for this reason the dissenting judge reasoned that these records of money going in and out of the trust account could be used to indirectly reveal the content of the communications made prior to the entries.[61]

This case serves as a reminder that not all facts stemming from a communication between a solicitor and client are privileged, but only those relating to communications made for the purpose of obtaining legal advice. The distinction made in this case pushes the limits of the rule, and it will be interesting to see how courts will continue to address this question as it arises in different contexts.

61. *Id.* at para. 115.