Ontario court weighs in on assuming jurisdiction over tort claims against foreign defendants

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On March 2, 2023, the Court of Appeal for Ontario released its decision in *Sinclair v Amex Canada Inc.,* 2023 ONCA 142, grappling with the application of the test for determining whether a Canadian court should assume jurisdiction over an out-of-province defendant (*Van Breda* test). Specifically, the Court examined the extent to which a contract made in Ontario with one defendant might extend an Ontario court's jurisdiction over other defendants that were not parties to the contract, although providing services that were tangentially related.

While the court unanimously agreed that the Ontario court did not have jurisdiction, the existence of concurring reasons suggests that the application of the *Van Breda* test may continue to be the subject of judicial debate.

Background

The action arose out of an accident on July 25, 2017 in Venice, Italy. The plaintiffs are two Ontario residents who travelled to Europe to celebrate their son's high school graduation. They were injured when a water taxi hired to take them from the airport to their hotel was involved in a collision.

The plaintiffs sued Amex Canada Inc., which operates the travel service through which they had arranged their trip. They also sued the Italian water taxi driver, as well as four Italian companies that had been contacted by Amex or its subsidiaries in order to provide transportation services for the plaintiffs. While the statement of claim pleaded the existence of the contract between the plaintiffs and Amex, the claim was framed in negligence, rather than breach of contract.

The motion decision

Amex did not quarrel with being subject to the jurisdiction of the Ontario court given its connections to the province. However, three of the four Italian companies brought a motion to dismiss or stay the action as against them on the basis that the Ontario Superior Court of Justice lacked jurisdiction over them. The Motion Judge dismissed this motion, finding that, pursuant to the Supreme Court's seminal decision in *Club Resorts*

Ltd. v Van Breda, 2012 SCC 17, the plaintiffs had satisfied the fourth presumptive connecting factor, namely that a contract connected with the dispute had been made in Ontario.

The appellate decision

The court unanimously granted the Italian companies' appeal, staying the action as against them on the basis of lack of jurisdiction. However, two sets of reasons emerged, granting this relief on different bases.

The majority judgment of Justices Nordheimer and Tulloch rejected the motion judge's finding that one of the *Van Breda* factors had been satisfied. Expressing the view that "some authorities subsequent to *Van Breda*, have failed to apply the decision with the care and rigour that was intended", the majority recalibrated *Van Breda* to define the key inquiry as whether the defendant had any contractual obligations made in Ontario to the plaintiff, either directly or indirectly. In this case, they found that the Italian companies could not be roped into the Ontario litigation based on a contract that they did not sign, did not mention them, and did not require their involvement, noting also that the contract was not pleaded with any specificity in the statement of claim. They distinguished the Supreme Court's holding in Lapointe Rosenstein Marchand Melançon LLP v Cassels *Brock & Blackwell LLP,* 2016 SCC 30, arguing that this had been a breach of contract action in which the impugned contract at least "contemplated and required the involvement" of the moving parties, even if they were not explicitly named therein. They further noted that *Cassels Brock* involved an interprovincial dispute, rather than an international one.

The majority judgment stressed that the *Van Breda* test factors must be assessed independently from the perspective of each defendant, such that one defendant cannot be "bootstrapped" into the court's jurisdiction through its connection to another defendant. The majority further held that even if a presumptive connecting factor had been made out, the motion judge erred by failing to consider whether it had been rebutted on the facts of this case. The majority found that it had been rebutted, as the contract between the plaintiffs and Amex had "little or nothing to do with the subject matter of the litigation," quoting *Van Breda*.

In concurring reasons, Justice Harvison Young agreed that the appeal should be allowed, but on the basis that the Italian companies had rebutted the presumptive connecting factor. Justice Young disagreed with the majority as to whether the contract was enough to give rise to such a factor in the first place. In essence, the concurrence opined that the majority view was not in line with the Supreme Court's broad interpretation of the contractual connecting factor in *Cassels Brock* and was instead embracing the logic of the dissent in that case (in contrast to recent decisions of appellate courts in Alberta and British Columbia). The concurrence held that it was sufficient that "but for" the Ontario contract between the plaintiffs and Amex, the plaintiffs would not have suffered the harm at issue.

Commentary

This decision illustrates the complex issues that must be taken into account when defending tort claims against foreign defendants in an Ontario court. The majority

warned that if the motion decision had been upheld, it would have had “sweeping implications” for travel agencies and credit card companies that arrange foreign trips. Given the differing views between the majority and concurring reasons, and the existence of contrasting judgments from other provincial appellate courts, it would not be surprising to see the Supreme Court consider these issues yet again in the near future.

For more information on defending tort claims against foreign defendants, please reach out to any of the key contacts listed below.

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