LITIGATION - CANADA

Supreme Court clarifies test for assuming jurisdiction based on contract connected with dispute

August 16 2016 | Contributed by Dentons

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Introduction

On July 15 2016, the Supreme Court of Canada released its decision in *Lapointe Rosenstein Marchand Melançon v Cassels Brock & Blackwell*.(1) The case addressed whether the Ontario courts had jurisdiction to hear the third-party claim commenced by Cassels Brock & Blackwell in the class action brought against it by Canadian General Motors (GM) dealers.(2) In a six-to-one decision, the Supreme Court upheld the Ontario Court of Appeal's decision that the Ontario courts had jurisdiction; the lone dissenting judge wrote a lengthy and critical dissent.

Facts

Lapointe considered a series of wind-down agreements entered into between GM and GM dealers from across Canada in 2009, following the 2008 financial crisis and subsequent to a bailout by the federal government. Under the agreements, GM provided compensation to the dealerships that closed. Each dealer was required to obtain independent legal advice with respect to entering into the agreement.

Dealers that signed the wind-down agreements subsequently started a class action in Ontario, alleging that Cassels Brock was negligent in failing to provide appropriate legal advice in connection with the wind-down agreements. Cassels Brock added other law firms that gave independent legal advice to the dealers as third parties. The non-Ontario law firms challenged the jurisdiction of the Ontario courts to hear the third-party claim against them. The motions judge dismissed the motion and the Quebec law firms appealed. The Ontario Court of Appeal dismissed the appeal.

Decision

In its 2012 decision in *Club Resorts v Van Breda*,(3) the Supreme Court identified four non-exhaustive presumptive factors that can establish a real and substantial connection sufficient to give a Canadian court jurisdiction to hear a dispute:

- The defendant is domiciled or resident in the province;
- The defendant carries on business in the province;
- The tort was committed in the province; and
- A contract connected with the dispute was made in the province.

The issue on the motion (and subsequent appeals) was whether the fourth presumptive connecting factor – a contract connected with the dispute made in the province – existed in *Lapointe*; in other

words, whether the wind-down agreements were contracts made in Ontario and connected with the dispute.

Writing for the majority, Justice Abella set out a two-step process for determining whether there was a contract made in Ontario that was connected with the dispute:

- Identify the dispute (which the majority in *Lapointe* identified as relating "to the claims that there was negligent advice about the Wind-Down Agreements").**(4)**
- Determine whether a contract connected with the dispute was made in Ontario.**(5)**

The majority began this second part of its analysis by determining where the wind-down agreements were made. Relying on S M Waddams' *The Law of Contracts* (6th ed 2010), the majority held that "[w]here contracting parties are located in different jurisdictions, the contract will be formed in the jurisdiction where the last essential act of contract formation, such as acceptance, took place".**(6)**

To determine the last essential act, the majority looked to a May 20 2009 letter from GM's vice president of sales, service and marketing to the dealers, which was attached to the wind-down agreements. It provided that the agreements "will not become effective unless and until GM Canada provides written notice to those dealers that the acceptance threshold condition and any other required conditions have been met or have been waived by GM Canada".**(7)** On this basis, the majority concluded that the last act essential to contract formation occurred at GM's office in Oshawa, Ontario, where GM's vice president of sales, service and marketing accepted the wind-down agreements that had been signed and returned by the dealers.**(8)** The contract was held to have been made in Ontario.

The majority also held that the written notice that was subsequently provided pursuant to the May 20 2009 letter "merely *confirmed* that the conditions for the Agreements to become effective had been met", and that the receipt of the notice in Quebec by the Quebec lawyers (by email) did not alter where the wind-down agreements were made. The majority agreed with the conclusion of the Ontario Court of Appeal that, accordingly, "the stipulated manner in which the [wind-down agreements] would become effective renders inapplicable the general rule that a contract transmitted instantaneously is made in the jurisdiction where acceptance is received".**(9)**

Having found that Ontario had jurisdiction, the majority also found that "the Wind-Down Agreement is clearly connected to Cassels Brock's third party claims against the local lawyers", on the basis that the agreement "contemplated and required the involvement of the local lawyers" as it required that each dealer return a signed copy of the certificate of independent legal advice.**(10)** In doing so, the majority held that *Van Breda* does not limit this fourth connecting factor to situations in which the defendant's liability flows immediately from the contract made in the province; nor does it require that the defendant be a party to the contract.**(11)**

Finally, the majority considered other contextual factors to determine whether the wind-down agreement had been made in Ontario, including whether:

- the agreement was governed by Ontario law;
- GM's head office was located in Ontario;
- the 'bulk' of the dealers were located in Ontario; and
- the underlying structure of the business relationship and litigation were deeply related to Ontario.

These factors supported the conclusion that the agreement was made in Ontario.

The majority then conducted a *forum non conveniens* analysis. While Quebec may have been an appropriate forum to hear the motion, it was not a clearly more appropriate forum. This finding was based partially on the numbers involved: 32 Quebec firms versus 67 Ontario firms (in addition to the 118 non-Ontario firms that did not appeal the motion judge's jurisdiction finding).

Dissent

In a lengthy and critical dissent, Justice Côté disagreed with two aspects of the majority decision. She

found that the wind-down agreements were made in Quebec and the dispute was not sufficiently connected to the agreement to satisfy the fourth requirement of the *Van Breda* test.

She agreed with the principle that a contract is deemed to be formed in the location of the last essential act.**(12)** However, she held that the last essential act of contract formation in *Lapointe* was the receipt of the notice by the dealers in Quebec. This was considered the final acceptance, such that the wind-down agreements were made in Quebec.

Relying on the May 20 2009 letter, which stated that the wind-down agreements were not effective "unless and until GM Canada provides written notice to those dealers that the acceptance threshold condition and any other required conditions have been met or have been waived by GM Canada", the dissenting judge found that the agreement was effective only when GM notified the dealers by email that it had decided to waive its acceptance threshold.**(13)** She held that "[t]his notice did not merely confirm that General Motors' conditions had been met. Rather, this notice of final acceptance was itself an essential condition for the Wind-Down Agreements to become binding".**(14)**

In addressing where this notice was provided, she found that "it is well established that when acceptance of a contracted is transmitted instantaneously [such as by e-mail], acceptance will be considered notified in the place in the place where it is received".**(15)** In *Lapointe*, the notice was sent by email and received by the dealers in Quebec – the acceptance was therefore received in Quebec and the contracts were held to be have been made there.

The dissenting judge rejected the majority's reliance on the contextual factors described above, which were found to "have *nothing* to do with where the Quebec dealers' agreements were formed". **(16)**

On the issue of whether the wind-down agreements were connected with the third-party claims, she considered the approach taken by the majority to be 'unduly broad' and cautioned that this approach would "[r]eintroduce persistent uncertainties in an area of the law that has always valued clarity and predictability".**(17)** *Van Breda* "never said – and in my view, cannot be read as saying – that simply *any* contract connected with the dispute can support jurisdiction under the fourth factor".**(18)**

In *Lapointe*, the Quebec lawyers were "never brought within the scope of the contractual relationship between General Motors and the dealers",(19) as they:

- were not parties to the wind-down agreements;
- owed no obligations under the agreements; and
- were owed no benefits under those agreements.

The only contracts that could be close enough to the dispute between Cassels Brock and the Quebec lawyers were the retainer agreements between the Quebec lawyers and their clients. The wind-down agreements were "simply too remote".**(20)**

The dissenting judge held further that the fourth connecting factor should be given a narrow interpretation "limited to claims in tort where the defendant's liability in tort flows immediately from his own contractual obligations, and where that contract was made in Ontario".**(21)** She also remarked on some of the consequences of a "broad and open-ended approach" to the fourth connecting factor adopted by the majority,**(22)** pointing to:

- the possibility of judicial overreach, which conclusion "is supported by the fact that every other jurisdiction I have surveyed... would not have assumed subject matter jurisdiction over the underlying cause of action against the Quebec law firms in these circumstances";**(23)**
- the compromised certainty and predictability of the presumptive connecting factors "that was promised when *Van Breda's* presumptive basses of jurisdiction replace the discretionary list of factors outlined in *Muscutt v. Courcelles*";**(24)** and
- the potential implications on the practice of law, pointing to the fact that in this case, the *Barreau du Quebec*'s liability insurance policy indemnifies lawyers sued for professional negligence for up to C$10 million if sued in Quebec, but only up to C$1 million if sued outside the province.

Finally, the dissenting judge held that, in any event, Quebec was the more appropriate forum for the third-party claim, and that whatever jurisdiction the courts of Ontario possessed over these national firms should be declined on that basis.

Comment

Going forward, courts applying the majority's reasons to new facts will likely need to navigate the concerns highlighted in the dissenting reasons to determine when a contract is too remote to be connected to a dispute. This may be of particular concern to a court addressing an international dispute, rather than an inter-provincial dispute such as that in *Lapointe*. Courts will be faced with applying the majority's broad interpretation of *Van Breda* in this scenario, while at the same time striving for the predictability emphasised in *Van Breda*.

Lapointe demonstrates that determining the last essential act to contract formation will not always be a clear-cut exercise, and that parties may seek to set out what the last essential act of contract formation is through the contract itself, in order to have some control over where the contract might later be found to have been made. The May 20 2009 letter in this case is an example of parties having at least some control over what that last essential act is and where it takes place. Contract drafters may wish to consider this issue when drafting contracts that have inter-provincial and international elements.

For further information on this topic please contact Chloe Snider at Dentons by telephone (+1 416 863 4511) or email (chloe.snider@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2016 SCC 30 [*Lapointe*].

(2) In connection with which there was a finding against Cassels Brock in 2015. See *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2015 ONSC 3824.

(3) 2012 SCC 17 [*Van Breda*].

(4) *Lapointe*, supra at paras 36-38.

(5) *Ibid* at paras 36 and 39.

(6) *Ibid* at para 40.

(7) *Ibid* at para 41.

(8) *Ibid* at para 42.

(9) *Ibid* at para 43.

(10) *Ibid* at para 47.

(11) *Ibid* at para 44.

(12) *Ibid* at para 73.

(13) *Ibid* at para 76.

(14) *Ibid* at paras 76-77.

(15) *Ibid* at para 79.

(16) *Ibid* at para 81.

(17) *Ibid* at para 69.

(18) *Ibid* at para 85.

(19) *Ibid* at para 86.

(20) *Ibid* at para 99.

(21) *Ibid* at para 87.

(22) *Ibid* at paras 101-135.

(23) *Ibid* at para 112. See *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA).

(24) *Ibid* at para 122.

Eric Freilich, a summer law student at Dentons Canada LLP, assisted with the preparation of this update.
