

Torys on Litigation and Dispute Resolution

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Ontario Appeal Court Clarifies Test for Jurisdiction over Foreign Defendants

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In an important ruling, the Ontario Court of Appeal has clarified the circumstances in which an out-of-province defendant may be sued in Ontario. The decision in the companion cases of *Van Breda v. Club Resorts Ltd.* and *Charron v. Club Resorts Ltd.*, released February 2, 2010, has significant implications both for non-Ontario companies soliciting Ontario customers and for Ontario-based firms doing business abroad.

Background

In both cases, the plaintiffs suffered damages resulting from accidents that occurred at resorts in Cuba operated by the defendant, Club Resorts Ltd., a company incorporated in the Cayman Islands.

The plaintiffs brought claims in Ontario against the defendant, which moved to strike out both claims on the basis that the Ontario courts lacked jurisdiction. Both motions judges found that they did have proper jurisdiction over the defendant. The defendant appealed to the Ontario Court of Appeal.¹

The Court of Appeal Decision

A five-judge panel of the Ontario Court of Appeal unanimously upheld the lower court rulings in favour of jurisdiction. The Court of Appeal's decision clarifies and reformulates the test for determining when Ontario courts will assume jurisdiction over a foreign defendant. The decision provides important guidance to litigants regarding the types of factual circumstances in which Ontario courts will assume jurisdiction.

Under the new test, an Ontario court will presumptively assume jurisdiction over a foreign defendant if the plaintiff's claim against that defendant falls within one or more of several categories. These categories include (i) a claim in respect of a contract made in Ontario, or governed by Ontario law, or through which the parties accept the jurisdiction of the Ontario courts; (ii) a claim in respect of a tort committed in Ontario; and (iii) a claim in respect of real or personal property located in Ontario.

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¹ Torys LLP acted for an intervener, the Tourism Industry Association of Ontario, on the appeal.

If the plaintiff's claim does not fall within one or more of these categories, the Ontario courts will consider whether there is nonetheless a sufficiently strong connection between Ontario and the plaintiff's claim, or between Ontario and the defendant, to warrant an assumption of jurisdiction over the foreign defendant.

The Court of Appeal articulated several overarching principles that an Ontario court must consider when determining whether to take jurisdiction over a foreign defendant. The Court of Appeal stated that, throughout the jurisdictional analysis, a court is required to be mindful of any unfairness that may be done to a party (either the plaintiff or the defendant) if jurisdiction is assumed or declined. Notably, too, the Court of Appeal held that an Ontario court should not assume jurisdiction over a foreign defendant if the Ontario court would not recognize and enforce the judgment of a foreign court against an Ontario-based defendant rendered on the same jurisdictional basis.

The Court of Appeal applied the new test to the facts in both cases. In *Van Breda*, the Court of Appeal found that jurisdiction was properly assumed over the Cayman Islands defendant because the plaintiff's presence at the defendant's resort arose from a contract entered into by the defendant in Ontario with the plaintiff's boyfriend (under which the boyfriend was to teach at the resort and was permitted to bring a companion). The Court of Appeal also found (i) a sufficient connection between Ontario and the plaintiff's claim because the plaintiff was resident in Ontario before she travelled to Cuba; and (ii) a sufficient connection between Ontario and the defendant because the defendant hired advertisers in Ontario and entered into contracts with tour operators in Ontario that promoted the defendant's resorts.

In *Charron*, no contract was formed in Ontario between the Cayman Islands defendant and the plaintiff, but the Court of Appeal found a sufficient connection between Ontario and the plaintiff's claim because the plaintiff suffered damages in Ontario. The Court of Appeal also found a sufficient connection between Ontario and the defendant because the defendant actively advertised in Ontario, and benefited from an office in Ontario that provided information about the defendant and promoted a brand licensed by the defendant.

Implications of the Decision

The Court of Appeal's ruling makes clear that if a foreign defendant targets customers in Ontario and takes steps in Ontario (such as advertising or entering into a contract in Ontario) to obtain the business of those customers, the Ontario courts will assume jurisdiction over a claim against the defendant by one of those customers.

For Ontario-based businesses, the decision has another important implication: Ontario courts will recognize and enforce the judgments of foreign courts where the foreign courts take jurisdiction over Ontario-based defendants on the same bases that Ontario courts take jurisdiction over foreign defendants. In other words, judgments of foreign courts against Ontario-based businesses that target customers in those foreign jurisdictions will likely be recognized and enforced by Ontario courts. However, the Court of Appeal suggested that if an Ontario-based business restricts its marketing and similar promotional activities to Ontario, it is not likely to be exposed to the judgments of foreign courts.

The Court of Appeal points out, notably, that Ontario businesses can protect themselves against such a result by requiring foreign customers to enter into choice of law and choice of forum clauses that specifically state that any claims must be litigated in Ontario, under Ontario law. **11**