ONTARIO COURT OF APPEAL INTERPRETS *VAN BREDA* TEST IN THE CONTEXT OF TORT ACTIONS IN *SINCLAIR V AMEX CANADA INC.*

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In the recent decision of *Sinclair v Amex Canada Inc.*[1], the Ontario Court of Appeal ("**ONCA**") allowed the appeal from three defendant Italian companies (the "**Foreign Defendants**") and stayed the tort action on the basis that the Ontario Superior Court of Justice lacked jurisdiction over these defendants.

Background

On July 25, 2017, the Canadian plaintiffs were injured in a water taxi accident while on holiday in Venice, Italy. After returning to Canada, the plaintiffs brought an action in negligence for damages arising out of the incident against Amex Canada Inc. ("**Amex Canada**"), which provided travel-related services to individuals in Canada, the Foreign Defendants, which were three Italian companies (Venezia Turismo, Venice Limousine S.R.L., and Narduzzi e Solemar S.L.R.) that had been contacted by Amex Canada or its subsidiaries to provide transport services to the plaintiffs, and the Italian water taxi driver.

The Foreign Defendants brought a motion to dismiss or, alternatively, stay the action, on the basis that the Ontario Superior Court of Justice lacked jurisdiction over them. The motion was dismissed and it was held that pursuant to the fourth presumptive connecting factor enumerated by the Supreme Court of Canada in *Van Breda*[2], the contract connected with the dispute was made in the province, allowing the provincial court to assume jurisdiction over the Foreign Defendants with respect to plaintiffs' action. The Foreign Defendants appealed the decision.

The Appeal Decision

The Court of Appeal unanimously allowed the appeal and stayed the action against the Foreign Defendants.

The majority of the Court of Appeal emphasized that the application of the presumptive connecting factors is to be viewed from the perspective of the defendant who is disputing jurisdiction, whereby the position of each defendant must be looked at independently and there must be a presumptive connecting factor that attaches to each individual defendant.[3]

On this basis, it found that the fourth presumptive connecting factor did not create a real and substantial connection between the dispute and the court assuming jurisdiction because the contract between the plaintiffs and Amex Canada did not create a direct or indirect contractual relationship between the plaintiffs and the Foreign Defendants nor required their involvement, and was not pleaded with any particularity.[4] The Foreign Defendants could not be "bootstrapped" into the court's jurisdiction solely through their connection to Amex Canada.[5]

The Court of Appeal further held that the presumptive connecting factor had been rebutted because the contract between the plaintiffs and Amex Canada had "little or nothing to do with the subject matter of the litigation".[6] In examining the facts, it was noted that there was simply nothing that connected the events and the Foreign Defendants to Ontario:

- None of the Foreign Defendants were reasonably expected to be called to answer legal proceedings in Ontario;
- The Foreign Defendants had accepted a task to be undertaken in Italy;
- The events underlying the claim occurred in Italy;
- The defendant companies were Italian companies, and the driver of the water taxi was an Italian national.[7]

The Court emphasized that "the fact that the respondents used a credit card company that happens to carry on business in Ontario, to make their travel arrangements does not establish a relationship between the respondents and the appellants that could sustain a finding of jurisdiction".[8]

In contrast, the concurring judgment emphasized that the plaintiffs only needed to establish that "the events that give rise to the claim flow from the relationship created by" the Ontario contract and that the defendants' negligence brings them "within the scope of the contractual relationship".[9] Applying this principle, this judgment concluded that "but for" the Ontario contract between the respondents and Amex Canada, including the water taxi booking made under this Ontario contract, the respondents would not have suffered harm.[10]

Key Takeaways

- The provincial courts may not be able to extend their jurisdiction to foreign companies or individuals that did not contract directly with the plaintiff. A plaintiff's contract with a company that carries on business in Ontario and arranges for services through foreign defendants is not sufficient to establish a real and substantial connection and allow assumption of jurisdiction by the provincial courts;
- There is conflicting case law on how the *Van Breda* approach should be applied in regards to the fourth

presumptive connecting factor. Courts have held that foreign defendants should not be 'bootstrapped' into the court's jurisdiction solely through their connection to a company that carries on business in Ontario[11], and in contrast have also found that it is sufficient that the dispute be "connected" to a contract where a defendant's conduct brings them within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract[12]; and

- The decision illustrates the importance of considering jurisdictional issues and complexities in tort claims with foreign defendants, including whether service of a claim was effective, the factual circumstances of the issue and whether there is a 'real and substantial' connection, and whether the correct entity was named in the action. Consideration of these issues will assist foreign defendants in determining whether motions should be brought to have the claim dismissed or alternatively stayed for lack of jurisdiction, service be set aside, and/or (correct) parties to be deleted, added or substituted.

[1] *Sinclair v Amex Canada Inc.*, 2023 ONCA 142 ["*Sinclair*"].
[2] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para 90.
[3] *Sinclair* at paras 18 and 19.
[4] *Ibid* at paras 24, 29 and 35.
[5] *Ibid* at para 19 and 29.
[6] *Ibid* at paras 32, 35 and 37.
[7] *Ibid* at para 36.
[8] *Ibid* at para 36.
[9] *Ibid* at paras 55 and 62.
[10] *Ibid* at para 80.
[11] *Ibid* at para 19 and 29.
[12] *Sinclair*, supra note 1 at para 24 referencing *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para 44.

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A Cautionary Note