

cross-border litigation bulletin

October 2010

beware – indemnify a Canadian company and you may just find yourself stuck in a Canadian Court

A foreign company's agreement to indemnify an Ontario co-defendant may influence a court to assume jurisdiction over the foreign company as well, according to a recent decision of the Ontario Court of Appeal.

background

In *Dilkas v Red Seals Tours Inc.*,¹ the plaintiffs were injured in a single vehicle accident while on a bus travelling from a resort in Cancun, Mexico, to the airport. Mexican police concluded that the bus driver had been driving unsafely and was solely responsible for the accident.

The plaintiffs sued Sunwing Vacations ("Sunwing"), an Ontario company from whom the plaintiffs had purchased their vacation package and Best Day Tours ("Best Day"), a Mexican company that operated the bus under an agreement with Sunwing. The lawsuit was filed in Ontario.

Best Day, the Mexican company, brought a motion challenging the jurisdiction of the Ontario court.

decision of the motions judge

An Ontario court will assume jurisdiction over a foreign defendant where there is a real and substantial connection between the action and Ontario. At that time, the test for determining whether there was a real and substantial connection was the Ontario Court of Appeal's decision in *Muscutt v Courcelles*,² which set out a list of eight factors to consider in determining whether a real and substantial connection was present.

The motions judge weighed the eight factors and concluded that the balance weighed in favour of the Ontario Superior Court of Justice

¹ 2010 ONCA 634, aff'g 2009 CanLII 68185 (ON SC) [*Dilkas*].

² (2002), 60 OR (3d) (CA).

assuming jurisdiction over Best Day. In particular, the motions judge observed that:

- Best Day's contract with Sunwing, an Ontario company, was expressly governed by Ontario law such that Best Day had a connection to Ontario;
- At its core, the case was about damages, not liability, and the plaintiffs' key witnesses concerning damages were located in Ontario; and
- The claim against Sunwing, a necessary party to the suit, was rooted in Ontario.

The court dismissed Best Day's motion and Best Day appealed.

decision of the Ontario Court of Appeal

Between the release of the decision on the motion and the hearing of the appeal, the Ontario Court of Appeal in *Van Breda v Village Resorts Limited*³ refined the test for determining whether there is a real and substantial connect between the action and Ontario.

In *Van Breda*, the Court ruled that there is a rebuttable presumption in favour of assuming jurisdiction over a defendant served with a statement of claim outside Ontario. The presumption does not apply, however, where the claim is served without a court order solely on the basis of either: (i) that the plaintiff sustained damage in Ontario; or (ii) that the proposed defendant was a necessary or proper party to a proceeding properly brought against another party served in Ontario.

In *Dilkas*, the exceptions to the presumption of jurisdiction applied such that, in accordance with *Van Breda*, the focus shifted to the connection of the claim and of Best Day to Ontario. Among the connecting factors identified by the Court of Appeal, it found that an indemnity agreement entered into between Best Day and Sunwing following the accident was particularly important. The agreement provided for an indemnity in respect of any lawsuit that might be brought in Ontario by a tourist injured in the bus accident. The indemnity agreement was governed by Ontario law and provided that Ontario courts would have exclusive jurisdiction over any dispute in interpreting the indemnity agreement.

In the Court of Appeal's view, by entering into the indemnity agreement, Best Day acknowledged the expectation that claims arising out of the accident would or could be brought in Ontario, and that those claims would have to be litigated in Ontario. The Court wrote that "any unfairness to Best Day in Ontario assuming jurisdiction is overridden by the terms of the indemnity agreement"

Best Day's appeal was therefore dismissed.

³ [2010], 98 OR (3d) 721 (CA) [*Van Breda*].

consult local counsel

This case should serve as a warning to foreign corporations to carefully consider the terms of indemnity agreements with co-defendants in other jurisdictions. While such agreements may benefit the relationship between co-defendants, they may undermine efforts to avoid Canadian courts assuming jurisdiction over the foreign company itself.

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a cautionary note

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