Blaney McMurtry LLP

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Blaney McMurtry Wins Dismissal of $150,000,000 Action

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Blaney McMurtry LLP lawyers Tim Alexander and Alva Orlando recently obtained the dismissal of a $150,000,000 claim brought by a Canadian gold mining company against a U.S. based engineering firm and its employees on the basis that the Ontario court lacked jurisdiction over the matter.

The action arose from the 2007 destruction of the Bellavista gold mine in Costa Rica. The plaintiff, Central Sun Mining Inc. ("Central Sun"), a Toronto based gold mining company, retained Blaney's client, the mining engineering firm of Steffen Robertson Kirsten (U.S.) ("SRK"), to provide pre-construction design services. The mine began producing gold in 2005, however, on October 21, 2007 a major landslide at the site brought operations to a halt and eventually lead to its closing.

Central Sun commenced an action in the Ontario Superior Court of Justice against SRK and other engineering firms involved in the project seeking damages of $150,000,000. Central Sun sought compensation for the loss of its property and equipment, the expenses incurred to remediate the physical and environmental consequences of the landslide as well as its past and future loss of profit.

Blaney McMurtry brought a motion to dismiss or stay the plaintiff's action on the basis that the Ontario court did not have jurisdiction over the subject matter of the litigation. Following a two day motion, Mr. Justice Stinson held that the Ontario Court lacked jurisdiction and dismissed the action against SRK and another U.S. engineering firm who had also brought a motion on the same grounds (*Central Sun Mining Inc. v. Vector Engineering Inc.*, 2012 ONSC 7331).

Legal Framework for the Jurisdiction Analysis

Justice Stinson's decision is one of the first to apply the new test for determining jurisdiction recently formulated by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 ("*Van Breda*"). The first part of that test requires a consideration of whether the subject

matter of the dispute has a “real and substantial connection” with the Ontario court. If a real and substantial connection does not exist then the court does not have jurisdiction. If such a connection is found the court will then look at whether Ontario is the most convenient forum in which to adjudicate the dispute.

Under the first part of the test, the “jurisdiction *simpliciter*” analysis, the burden is on the plaintiff to show that the claim falls within at least one of four “presumptive connecting factors” in tort cases drawn from Rule 17.02 of the *Rules of Civil Procedure*, in which a real and substantial connection is presumed to exist that would entitle a court to assume jurisdiction over a dispute:

1. The defendant is domiciled or resident in the province (Rule 17.02(p));
2. The defendant carries on business in the province (Rule 17.02(p));
3. The tort was committed in the province (Rule 17.02(g)); and
4. A contract connected with the dispute was made in the province (Rule 17.02(f)(i)).

If one of the four connecting factors is present, a real and substantial connection is presumed and the onus shifts to the defendant to establish that a real and substantial connection does not exist. In order to rebut presumptive jurisdiction, the defendant must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship or points only to a weak relationship between the subject matter of the litigation and the forum.

If one of the four specified presumptive connections is not present, the plaintiff may still attempt to establish an analogous presumptive connection.

If no presumptive connecting factor applies or if the defendant rebuts an applicable presumption, the court does not have jurisdiction to decide the matter and must dismiss or stay the action.

If jurisdiction *simpliciter* is established, the Ontario court still has discretion to decline jurisdiction under the second part of the test, the forum *non conveniens* doctrine. The defendant must invoke forum *non conveniens* and bears the burden of demonstrating that it would be fairer to the parties and more efficient to choose an alternative forum.

Decision of Justice Stinson

Central Sun argued that at least two presumptive factors were present: (1) the claim was in respect of torts committed in Ontario; and (2) the claim was against persons carrying on business in Ontario. The plaintiff further argued that there were two “new” connecting factors between the claim and the defendants: (3) the claim was in respect of property in Ontario; and (4) the claim was in respect of a breach of contract in Ontario.

(1) DOES THE ACTION CONCERN A CLAIM IN RESPECT OF TORTS COMMITTED IN ONTARIO?

The plaintiff’s main argument was that the alleged negligent engineering advice was relied on by its senior managers based in Toronto and that the consequences of the defendants’ negligence

were felt in Ontario, where Central Sun's head office was located, where its stock was publicly traded, where the damages to its corporate reputation and goodwill were felt, and where it incurred the cost of remediation and lost profits.

Justice Stinson accepted the defendants' submissions that the fact that the ultimate business decisions may have been made by the plaintiff's Toronto-based holding company (which indirectly owned the mine through separate, and often foreign, subsidiaries) and the fact that damages to its bottom line were sustained there do not serve as reliable indicators of a real and substantial connection. The SRK's engineering work was performed in either Colorado or Costa Rica and not in Ontario. Their reports were submitted and relied upon by Central Sun's technical experts in British Columbia rather than at the head office in Toronto. All of the physical damage and related losses occurred in Costa Rica.

Citing *Van Breda*, Justice Stinson noted that the jurisdiction in which damages have been sustained does not serve as a reliable indicator of a real and substantial connection. He agreed with the defendants' submission that "if all that is required to create a 'tort committed in Ontario' is that an Ontario-based company suffer damages, then Ontario courts would have jurisdiction over torts committed all over the world as long as even a small percentage of the damages suffered were suffered here, regardless of where the tort actually occurred" (at para. 53).

(2) DOES THE ACTION CONCERN A CLAIM AGAINST PERSONS CARRYING ON BUSINESS IN ONTARIO?

The plaintiff also argued that the court should assume jurisdiction over SRK as it carried on business in Ontario. SRK is a global organization which marketed itself internationally, including at trade shows held in Toronto. SRK also benefited from the presence of a related entity, SRK Canada, which was based in Ontario although it did not perform any work on the Bellavista project. The plaintiff also argued that SRK had performed services for other Ontario-based clients, both in and outside of the province and that this amounted to carrying on business in Ontario.

Justice Stinson rejected the plaintiff's submissions for the following reasons:

1. *Van Breda* explicitly rejected the notion that active advertising in a jurisdiction equates to "carrying on business" there. To establish that a defendant is carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the jurisdiction;

2. SRK and SRK Canada were completely separate corporate entities and SRK Canada had no involvement in the Costa Rican mine project;

3. The actual work was performed by SRK outside Ontario; and

4. While SRK had worked on other Ontario projects, the consulting work was not carried out in Ontario. If the test were "did you work for Ontario-based-clients?" that would be

tantamount to creating universal jurisdiction in the Ontario Court for all Ontario-based businesses in relation to all their foreign suppliers.

(3) DOES THE ACTION CONCERN A CLAIM IN RESPECT OF PROPERTY IN ONTARIO?

Justice Stinson accepted the defendants' submission that Central Sun's characterization of its claim as one in respect of property in Ontario because of damage to its reputation and goodwill in Ontario was an attempt to reintroduce damages as a presumptive category, a concept rejected by the Supreme Court in Van *Breda*.

(4) DOES THE ACTION CONCERN A CLAIM IN RESPECT OF A BREACH OF CONTRACT IN ONTARIO?

The Court rejected the plaintiff's submission on a number of grounds:

1. The plaintiff did not argue that the case involved a contract made in Ontario; the evidence suggested that to the extent that contractual relations existed with the defendants, the contracting parties were subsidiaries of the plaintiff;

2. The anticipated location for performance of the contracts was Costa Rica or Colorado, not Ontario; and

3. The omission of breach of contract in Ontario as a presumptive factor in *Van Breda* suggests that it should not be given presumptive status under the jurisdiction *simpliciter* analysis.

The Court concluded that, at its heart, the dispute involved complaints by an Ontario company about a loss of property in a foreign country, that was allegedly caused by the foreign defendants, performing services in a foreign country or countries. There was no real and substantial connection between the dispute and Ontario and the Court lacked jurisdiction to hear and decide the plaintiff's claims.

Having found that the action lacked a real and substantial connection with Ontario, the Court did not need to examine the issue of whether Ontario was the more convenient forum for the action.

The plaintiff has appealed the decision.

Impact of the Decision

The Supreme Court of Canada's decision in *Van Breda* has provided a clearer legal framework for determining whether an Ontario court has jurisdiction over a foreign defendant.

Justice Stinson's decision suggests that Ontario courts are prepared to look beyond how a plaintiff characterizes their claim in a pleading and examine the true nature of the dispute in assessing whether there is a real and substantial connection with the province.

Anyone insuring or defending an out-of-province defendant should undertake a *Van Breda* analysis to determine if the claim is one that is properly before the court. This must be done

before a defence or notice of intent to defend is delivered as doing so constitutes acceptance of the court's jurisdiction.