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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Action Against Short Line Freight Railway to Proceed

In *Sutherland v. VIA Rail Canada Inc.*, the Ontario Superior Court allowed the plaintiffs to add, as a party to the action, the company in charge of railway tracks on which an accident occurred, over five years after the date of the accident.

The Court found that the two-year limitation period imposed by the Ontario *Limitations Act, 2002* had not expired because the plaintiffs did not, and could not reasonably have been expected to, discover the identity of that company until approximately three and a half years after the accident.

The Court's view was that personal injury lawyers should not be expected to be familiar with specialized issues of railway law such as the fact that the railway tracks on which a rail carrier operates could be controlled by an entity other than the rail carrier which permits the rail carrier to use them. The Court also held that there was no prejudice, given that the company controlling the track had prepared an accident report and had conversations with the Transportation Safety Board days after the accident.

Pointedly, the Court held that if, in full knowledge of the accident, the company failed to anticipate the possibility of litigation down the road, and to preserve relevant evidence, it did so "at its peril."

The accident in question occurred on December 4, 2006, when the plaintiff's car struck a moving train operated by VIA Rail ("VIA") at a railway crossing. The train employees were unaware of the accident, having felt a "bump" which they suspected was due to ice. They discovered the accident only when the train came to its next station stop.

The portion of track where the accident occurred, including the crossing, was under the care and control of GEXR. GEXR had signed a lease with CN in 1998. VIA used the tracks with leave from GEXR as one of the terms of the lease.

Two hours after the accident, GEXR attended the scene. An employee prepared a Crossing Accident Report, recording the fact that the signals at the crossing were tested and found to be in working order. The Report also referenced the name of the investigating officer of the Stratford Police, which generated its own motor vehicle accident report.

Subsequently, GEXR corresponded with a representative of the Transportation Safety Board about the accident. GEXR provided details of the accident as it understood them, and of the testing of the crossing signals.

"I am not … satisfied that lawyers, doing personal injury work involving motor vehicle accidents necessarily are expected to have knowledge of, and familiarity with what many might view as the arcane area of railway law."

The plaintiffs received the Stratford Police accident report, and put VIA on notice of the claim in April 2007. In turn, VIA notified GEXR and requested its Crossing Accident Report.

Litigation was commenced in mid-2008. The statement of claim alleged that VIA was not only the operator of the train, but also the occupier of the track. VIA's defence consisted of a blanket denial, without reference to GEXR. Approximately eight months later, VIA produced a draft Affidavit of Documents. The Affidavit made an "oblique" reference to GEXR. Examinations for discovery were conducted on March 17, 2010, at which point GEXR's responsibility for the maintenance and safety of the crossing was explicitly revealed.

The Court considered two issues: was the claim out of time under the *Limitations Act*, and further, even if the action was not out of time, would GEXR be prejudiced if added as a defendant?

The focus of the limitation issue was the principle of discoverability. The two-year limitation period under the *Limitations Act, 2002* starts to run either when the plaintiffs first knew the injury or damage occurred and that it was attributed to the acts or omissions of a certain party against which it would be appropriate to bring proceedings, or, the day on which a reasonable person *ought* to have known the above. GEXR argued that reasonable diligence required the plaintiffs to do a property search, approach the Canadian Transportation Agency, search for information on the internet, or approach CN. GEXR also relied on two signs near the railway crossing. One sign indicated that anyone intending to dig in the area should contact CN, which had buried cable there. The second gave a number for GEXR in case of emergency close to the crossing.

The Court was not persuaded.

First, it found that there was no clear evidence that these signs were there at the time of the accident. Second, the Court found that the plaintiffs had conducted the case with reasonable diligence. The plaintiffs obtained the police report, gave notice to VIA, retained an engineer, and took steps in the case "in a normal and expected time frame." Finally, the Court stated that the plaintiffs could not be expected to know that the entity

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VIA Rail *(cont'd)*

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operating on a railway track might be different than the one who had care and control of the track and signal equipment. While this might be "readily apparent to those professionals who are involved on a regular basis with a federally regulated industry such as railways", lawyers doing personal injury work could not be expected to be familiar with "what many might view as the arcane area of railway law."

On the point of prejudice, the Court also had some strong words. The Court dismissed GEXR's concerns that many persons involved in track and signal maintenance at the time of the accident were no longer in its employment, and that it only maintained records for a year.

The Court held that GEXR should have known that trouble might be brewing after it found out about the accident. The Court held that GEXR's failure to maintain records and interview witnesses was at its own peril.

"If GEXR did not do its own due diligence in assessing the state of the tracks and the crossing and signal lights, take statements from possible witnesses and maintain all relevant records, it did so at its peril. Under those circumstances, I am not prepared to find that GEXR might be prejudiced."

The Court closed by highlighting the policy dynamic that underpins the principle of discoverability: the desire to encourage plaintiffs to commence an action as soon as possible, tempered by the principle that an action should not be precluded before a person is able to raise it.

Sutherland v. VIA Rail Canada Inc.
2012 ONSC 1599

Small Claims Court in Québec

WestJet was recently spared the usual consequences that arise when a litigant retains a lawyer to represent its interests in the Québec Small Claims Court.

The facts of the case were that the plaintiff, Jean-Paul Cajolais, arrived at the Orlando International Airport in Florida in order to board a WestJet flight to Montréal, only to discover that he had lost his passport by the time he arrived at the check-in counter.

As Mr. Cajolais recalls events, the WestJet check-in agent advised him that "it would not be possible for him to fly anywhere without his passport." Later that day, he learned from his wife, who had contacted the Canadian consulate in Miami, that he could, in fact, fly without a passport as long as his itinerary included only points within the United States.

As a result, he booked a flight to Plattsburgh, New York (~100 km from Montréal), where he was picked up by his wife in her car. Once the Plattsburgh flight was booked, Mr. Cajolais had no further contact with WestJet.

As it turned out, the Plattsburgh booking was not ideal for two reasons. First, Mr. Cajolais found his passport (which was in his luggage the whole time) shortly after he purchased a non-refundable ticket. Second, he was not able to get a booking to Plattsburgh on the date he was scheduled to leave on the WestJet flight and, as a result, he spent two days in a hotel in Orlando waiting to be repatriated to his homeland.

Mr. Cajolais sued WestJet for his expenses, citing the well-publicized WestJet "guaranty" that the airline will always "get its passengers home", and, in addition, that it would accommodate passengers in the event of delays or cancelations.

WestJet's Montréal attorney filed a defence to the claim referencing, among other things, WestJet's tariff which purports to limit liability for instances where inaccurate information is provided about travel document related issues.

On the date of the hearing, Mr. Cajolais persuaded Justice Cameron that WestJet's defence should be considered a "nullity" as a result of the Court's decision in *Gestion Olymbec Inc. v. Montreal* 2010 QCCQ 1224.

In that case, the Cour du Québec struck out a small claims action because the pleading had been filed by a lawyer on behalf of the plaintiff. In striking out that claim, the Court referred to Québec's *Code de procedure civile* as well as jurisprudence that holds that involving lawyer in small claims court actions would decrease access to justice and that permitting litigants to involve salaried lawyers in the process could have "pernicious effects in the medium and long term." A review of the jurisprudence reveals that the prohibition against retaining lawyers to act in the Québec Small Claims Court has been frequently applied.

In any event, in the matter at hand, Justice Cameron exercised his discretion to allow Richard Bartrem, an employee of WestJet, to enter WestJet's defence orally at the trial.

Mr. Bartrem testified that computer records created by WestJet at the time demonstrate that the check-in agent advised Mr. Cajolais to contact the consulate in Miami to obtain a replacement passport and, once the passport was secured, Mr. Cajolais was to make contact with WestJet to make new flight arrangements.

Having heard Mr. Bartrem's evidence, the Court found that the most likely scenario was that Mr. Cajolais was told that "he could not board a WestJet flight without a passport, because WestJet only runs on international routes and would not have been able to accommodate Mr. Cajolais by letting him off along the way in New York as he apparently suggested to them."

"In the Court's view, the entries made into the WesJet database, which are contemporaneous with the events, are an appropriate basis to confirm that WestJet acted reasonably, according to [its] policy, and offered Mr. Cajolais the option of changing his flight if and when he could obtain his passport."

Mr. Bertram also testified that, had Mr. Cajolais advised WestJet that he located his missing passport, he would have been given a new ticket home.

Mr. Cajolais' claim was dismissed.

Alas, WestJet's triumph was bittersweet. Justice Cameron ruled that if WestJet had set out the substance of Mr. Bertram's testimony in a properly filed defence, Mr. Cajolais would have had a full understanding of WestJet's defence — and, consequently, Mr. Cajolais would have had a better opportunity to assess the merits of his position.

As a result, WestJet was ordered to pay a modest amount towards Mr. Cajolais' "judicial costs".

Cajolais v. WestJet Airlines
2012 QCCQ 2113

End of the Line: Jurisdiction and *Forum Non Conveniens* *(cont'd)*

diction, if they are established.

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The Court upheld the OCA's framework which involves applying certain presumptive connecting factors. In tort cases, the Court held the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute: the defendant is domiciled or resident in the province (in the case of a legal person, the location of its head office); the defendant is carrying on business in the province; the tort was committed in the province; the contract was made in the province. This list is not exhaustive and can be added to over time, but it is illustrative of factual situations in which it will typically be open to a court to assume jurisdiction. The plaintiff must establish that one or more of the listed factors exist. If the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules – in such circumstances, the court need not exercise its discretion to assume jurisdiction as it *will have* jurisdiction, unless the challenging party rebuts the presumption. To rebut the presumption, the defendant bears the burden of negating the presumptive effect of the listed factors or any new factor, and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor applies or if the presumption of jurisdiction is rebutted, the court will lack jurisdiction on the basis of the real and substantial connection test. The Court stressed that a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors.

The Court held that even if jurisdiction over the claim is found to exist, it is open to the court to decline to exercise its jurisdiction on the basis of *forum non conveniens* – a residual power to be exercised in appropriate but limited circumstances. However, only the resort to the doctrine by raising it and the court cannot raise it on its own initiative. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has to the subject matter of the litigation. The defendant must show that the proposed alternative forum is "clearly" more appropriate and the analysis is context- specific. Factors to be considered might include location of parties/witnesses, cost of transferring the case to another jurisdiction or of declining the stay, impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition/enforcement of judgments, and the relative strengths of the connections of the two parties. The Court was careful to state that the court must refrain from leaning too instinctively in favour of its jurisdiction and differences between legal systems should not be viewed instinctively as signs of disadvantage or inferiority when considering loss of juridical advantage, a factor which should not be used too extensively.

The Supreme Court of Canada upheld the OCA's decision. The Court held that, in *Van Breda*, a presumptive factor had been met – namely, the contract was formed in Ontario. The contract was between an individual who would provide the plaintiffs with sports instruction at the resort in exchange for room and board, and Club Resorts, through an Ontario travel agent who represented Club Resorts.

"Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely. Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts rule would be incompatible with certain key objectives of a private international law system."

The Court found that the benefit of the contract was extended to the plaintiffs. It was also found that Club Resorts failed to rebut the presumption of jurisdiction and failed to discharge its burden under *forum non conveniens* of proving that a Cuban court would "clearly" be a more appropriate forum. The Court noted that a trial in Cuba would present serious challenges to the parties.

The Court reviewed the *Charron* case and again upheld the OCA's decision. The Court held that a presumptive factor had also been met by way of the appellant carrying on business in the jurisdiction. Club Resorts was found to do more than just advertise in Ontario, maintain contact with travel wholesalers/agents, or just promote a brand. Although Club Resorts did not have a corporate head office in Ontario, it engaged in significant commercial activity in Ontario through the office of the SuperClubs group, a brand used to actively market the Cuban resort to Ontario and Canadian residents. Club Resorts' representatives were in Ontario on a regular basis and it benefited from the physical presence of an office in Ontario; most significantly, its representative admitted on cross-examination that it was in the business of carrying out activities in Canada. The Court held that Club Resorts failed to rebut the presumption of jurisdiction and it failed to establish that the Cuban court would clearly be a more appropriate forum. The Court reiterated the inconvenience of transferring the litigation to Cuba.

One particularly relevant aspect of the Supreme Court's decision for our readers is its interpretation of "carrying on business" in the jurisdiction. The Court stated, "active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of 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 territory of the particular jurisdiction." The Court noted that it was not asked in this appeal to decide whether, and if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction, but it did refer to these statements as its "reservations" about the "carrying on business" factor; therefore, these statements provide some helpful guidance for future cases. The Court also noted that even if it is established that the "carrying on business" factor has been met, that presumption can be rebutted, for example, if the defendant shows that the subject matter of the litigation is unrelated to the defendant's business activities in the province.

It remains to be seen whether the Supreme Court actually simplified the framework for analysis of jurisdiction and *forum non conveniens*. Despite the Court's stated determination to remove the unpredictable discretionary element from both tests, one wonders whether the Court was guided by equitable considerations in the application of the test to the two specific cases before it.

End of the Line: Jurisdiction and *Forum Non Conveniens*

A recent decision from the Supreme Court of Canada has established the common law conflicts rules of Canadian private international law for the assumption of jurisdiction and the doctrine of *forum non conveniens.*

The appeal involved two separate proceedings brought in Ontario by plaintiffs for damages arising out of accidents that occurred at different holiday resorts in Cuba. In one action, the plaintiff, Ms. Van Breda, suffered catastrophic injuries on a beach in Cuba. In the other action, the plaintiffs sought damages for the death of Dr. Charron, who died while scuba diving in Cuba. The appellant, Club Resorts Ltd. ("Club Resorts"), managed the two hotels where the accidents occurred. Club Resorts brought motions to dismiss or stay the two proceedings on the basis of lack of jurisdiction and alternatively, on the basis that the Cuban court would be a more appropriate forum. The motions were dismissed by the motions courts and the Ontario Court of Appeal ("OCA").

On appeal, the OCA reformulated what has become known under the common law conflicts rules for the assumption of jurisdiction as the "real and substantial connection test". The old test involved the court's application of various "connecting factors" to the claim and the court's weighing of these factors. That test also garnered much criticism as a regime based on an exercise of almost pure and individualized judicial discretion. The OCA's reformulation involved the recognition of certain *presumptive* factors (to be discussed below) in an effort to simplify the test. Where one of the factors is established, a real and substantial connection justifying assumption of jurisdiction by an Ontario court would be presumed to exist. The list of presumptive connecting factors is not closed and any presumption which arises is rebuttable by the defendant. If none of the presumptive connecting factors apply to the claim, the onus rests on the plaintiff to prove that a sufficient relationship exists between the litigation and the forum. In determining whether there is a real and substantial connection, the OCA held that the "core" of the analysis rests on the connection between Ontario and the plaintiff's claim and the connection of the defendant to the forum, respectively.

"I do not accept that evidence of advertising in Ontario would be enough to establish a connection. Advertising is often international, if not global. It is ubiquitous, crossing borders with ease. It does not on its own, establish a connection between the claim and the forum."

The Supreme Court also noted that there are other considerations (for example, involvement of other parties to the suit; the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdiction basis; whether the case is interprovincial or international in nature; comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere) that guide the analysis but should no longer be treated as independent factors having more or less equal weight. Also, consideration of the fairness of assuming or refusing jurisdiction is a necessary tool in assessing the strength of the connections between the forum and the plaintiff's claim and the defendant. However, fairness is not a free-standing factor capable of trumping weak connections, subject only to the forum of necessity exception. The OCA made it clear that the *forum non conveniens* analysis (that is, whether another forum is more appropriate) is a discretionary analysis, separate from the analysis of whether jurisdiction exists.

The Supreme Court noted that the OCA's framework for the new real and substantial connection test is similar to the framework established by the Uniform Law Conference of Canada. That framework has been adopted by many other provinces and forms the basis for many provincial statutes. The Court emphasized that a clear distinction must be maintained between, on one hand, factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools such as the values of fairness and efficiency, or the principle of comity. These principles and analytical tools will inform the Court's assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's juris-

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Our transportation law group represents the interests of carriers in litigation of personal injury, property loss and commercial disputes. We also advise on insurance and regulatory issues and represent clients before the courts, agencies, tribunals and authorities with important jurisdiction over transportation undertakings.

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