

CASE LAW UPDATE

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Dilkas v Red Seal Tours Inc. (Sunwing Vacations)

2010 ONCA 63, Released 4 October 2010

Jurisdiction – Forum Conveniens – Application of New Test Set out in *Van Breda*

This was an appeal from a decision dismissing a motion challenging jurisdiction of the Ontario court and the convenience of the Ontario forum. The plaintiffs brought an action in Ontario for damages against Sunwing and Best Day after suffering serious injuries in Mexico on a bus tour. Sunwing cross-claimed against Best Day for contribution and indemnity, primarily based on the indemnification agreement executed after the accident to deal with claims arising out of accident.

Best Day brought a motion challenging both Ontario jurisdiction and the convenience of the Ontario forum. The motion was decided and dismissed by applying the test articulated in *Muscutt v Courcelles* (2002), 60 OR (3d) 20. Subsequent to the release of the motion judge's decision, the Court of Appeal released its decision in *Van Breda v Village Resorts Ltd* (2010), 98 OR (3d) 721. Applying the new test in *Van Breda*, the Court of Appeal dismissed the appeal.

With respect to the jurisdiction analysis, the key connecting factor identified in *Van Breda* is the connection of the claims and of the defendants to Ontario. Other considerations in the jurisdiction simpliciter analysis are no longer to be treated as independent factors, but rather as principles that bear upon the analysis, including fairness to each party of assuming or refusing to assume jurisdiction, the involvement of other parties in the action, willingness to recognize and enforce an extra-provincial judgment with similar jurisdictional connections to the forum, comity, and the standards of enforcement in the other jurisdiction.

Here, the Court of Appeal found that the vacation packages were purchased in Ontario; Best Day's transportation agreement with Sunwing was to be governed by the law of Ontario; and most significantly, Best Day entered into indemnity agreements with Sunwing following the accident, which was made in respect of any lawsuit that might be brought in Ontario by one of the tourists injured in the bus accident. Accordingly, Best Day expected and contemplated that the plaintiff's claims would be litigated in Ontario. These factors establish the necessary and real substantial connection between the plaintiff's claims, the defendant Best Day, and the Ontario forum.

Unlike the jurisdiction issue which is a question of law involving the weighing of factors and application of overarching principles, whether there is a more convenient and appropriate forum is an exercise of judicial discretion and is subject to deference on appeal. The location and convenience of witnesses is a factor relevant only to the forum *conveniens* analysis and is not to be considered when deciding whether there is jurisdiction *simpliciter*.

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