WeirFoulds LLP

# Appealing *Forum Non Conveniens*: Key Considerations

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The recent decision of the Ontario Court of Appeal in *GIAO Consultants Ltd. v 7779534 Canada Inc.*, 2020 ONCA 778 ("***GIAO Consultants***") provides some key considerations for parties in *forum non conveniens* disputes.

In *GIAO Consultants*, the appellants appealed a decision that the Superior Court had jurisdiction over and was the *forum conveniens* for the action brought by the respondent, GIAO Consultants Ltd. (" **GIAO**"), against the appellants and other parties who were not participants in the appeal.

**The Underlying Facts**

On January 21, 2020, GIAO issued a claim against the appellants and others claiming breach of contract, negligence, intentional misrepresentation, breach of trust and/or fiduciary duty, and civil conspiracy. The contract at issue had a clause providing that the governing law would be the laws of the Province of Quebec. The clause (the "**Governing Law Clause**") provided:

**Governing Law**

This Agreement shall be construed, interpreted and enforced in accordance with, and the respective rights and obligations of the parties shall be governed by, the laws of the Province of Quebec and the federal laws of Canada applicable in such province, and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of such Province and all courts competent to hear appeals therefrom.

Two of the defendants in the action filed a statement of defence, thereby submitting to the jurisdiction of Ontario courts. Two other defendants were residents of Ontario. The remaining four defendants did not submit to the jurisdiction of Ontario courts. They brought a motion to challenge the jurisdiction of the Ontario courts or, in the alternative, to seek a declaration that Ontario was *forum non conveniens* to determine the proceeding. The appellants' main argument with respect to Ontario being *forum non conveniens* was that if the matter proceeded in Ontario, it would be necessary to hire experts to prove Quebec law.

**The Decision at the Superior Court of Justice**

Justice Jill C. Cameron found that an Ontario court was entitled to assume jurisdiction based on the presumptive connecting factors set out in *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 ("***Van Breda***"). In *Van Breda*, the Supreme Court held that there is a non-exhaustive list of presumptive connecting factors which entitle a court to assume jurisdiction over a dispute. These connecting factors include: (1) whether the defendant is domiciled or resident in Ontario; (2) whether the defendant carries on business in Ontario; (3) whether a tort was committed in Ontario; or (4) whether a contract connected with the dispute was made in Ontario (the "**Van Breda Factors**").

In this case, Justice Cameron found that three of these presumptive connecting factors were present — the appellants were

conducting business in Ontario, a tort was committed in Ontario, and the contract connected with the dispute was made in Ontario.

With respect to the appellants' *forum non conveniens* argument, Justice Cameron stated that she failed "to see how it would be necessary to hire an expert to interpret Quebec law." Justice Cameron found that if it were necessary to hire experts, the cost, in the context of the overall cost of litigation, would not render a proceeding in Ontario unfair. Accordingly, it was not a factor that made Ontario *forum non conveniens.*

**The Ontario Court of Appeal's Decision**

On appeal, the appellants claimed that Justice Cameron erred by concluding that expert evidence was not required to prove Quebec law in Ontario courts. The Court of Appeal rejected this argument and noted that Justice Cameron did not state in absolute terms that hiring an expert to interpret Quebec law would not be necessary. Instead, Justice Cameron recognized the possibility that an expert would be required, and she held that the cost of an expert would not render the proceedings in Ontario unfair. The Court noted that GIAO's contract claim in its statement of claim was that one of the appellants and another defendant had not paid the purchase price of $165,000 for purchased shares. Thus, the contract claim was a simple one.

Further, the Court of Appeal reiterated that a motion judge's decision on a *forum non conveniens* issue is a discretionary one, and that an appellate court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision (citing *Haaretz.com v Goldhar*, 2018 SCC 28, at para. 49).

In examining the Governing Law Clause, the Court noted that although there was explicit wording that the parties would be governed by the laws of the Province of Quebec, the clause also referred to "the non-exclusive jurisdiction of the courts of such Province." The Court also pointed out that there were both contract and tort claims in the statement of claim and this could raise difficult questions of the applicable law.

The Court concluded that there was no good reason to overturn Justice Cameron's decision on the issues of jurisdiction or *forum non conveniens*. Ontario easily had jurisdiction to hear the case, and there was no basis to interfere with Justice Cameron's discretionary decision that Ontario was a proper forum in which to hear the case.

**Practical Implications**

This decision indicates that even where contractual provisions explicitly set out the governing law of a contract, this may not be determinative with respect to issues related to jurisdiction and *forum non conveniens*. In *GIAO Consultants*, although the Governing Law Clause provided that the contract was governed by the laws of the Province of Quebec, it also referred to "the non-exclusive jurisdiction" of Quebec courts.

Further, the decision may suggest that parties should not be so quick to argue that the need to hire experts to interpret the law of a jurisdiction will render another jurisdiction *forum non conveniens* or a proceeding in that other jurisdiction unfair. As in this case, a court would likely take into account the overall cost of litigation when deciding on a *forum non conveniens* issue, as well as the complexity of the legal issues requiring the application of foreign law.

The decision also highlights how appellate courts are hesitant to interfere with a motion judge's decision on a *forum non conveniens* issue. Parties considering appealing such decisions should only do so if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision.

Finally, the decision shows us that the Van Breda Factors remain pure gold in any court discussion of whether a court is entitled to assume jurisdiction over a dispute.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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