Citation: Fernandes v Wal-Mart Canada Corp, 2017 MBCA 96
Date: 20171003
Docket: AI16-30-08622

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre

B E T W E E N:

MYLES FERNANDES	)	***M. Fernandes***
	)	*on his own behalf*
	)	
(Plaintiff) Appellant	)	***K. M. Dolinsky*** *and*
	)	***P. A. Mueller***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
WAL-MART CANADA CORP.	)	***February 3, 2017***
	)	
	)	*Judgment delivered:*
(Defendant) Respondent	)	***October 3, 2017***

BEARD JA

I. THE ISSUES

[1] The plaintiff, Myles Fernandes, has appealed the dismissal of his action, which was dismissed by the motion judge on the basis that the Manitoba courts do not have jurisdiction *simpliciter* to hear the matter. Having dismissed the action, the motion judge declined to rule on the defendant, Wal-Mart's, alternative motion for a stay of the Manitoba action on the basis of the doctrine of *forum non conveniens*. Both parties have asked that, if we find that the Manitoba courts do have jurisdiction *simpliciter* to hear the action, we proceed to determine Wal-Mart's motion for a stay, rather than sending the matter back to the motion judge.

II. THE FACTS

[2] Mr. Fernandes is not challenging any of the factual findings by the motion judge. The underlying action relates to Mr. Fernandes's very short-term employment with Wal-Mart at a store in Ontario, where he was employed for approximately six weeks as a part-time store standards associate. He began work on October 11, 2014, and he resigned effective November 22, 2014. None of Mr. Fernandes's employment duties were performed in Manitoba and there was no aspect of his job that related to Manitoba or to Wal-Mart's operations in Manitoba. He listed an Ontario home address and telephone number at the time of his employment.

[3] It is also agreed that, throughout this time, Wal-Mart carried on business in Manitoba through its 13 stores located throughout the province. It was incorporated in Nova Scotia, and its head office was and is located in Ontario.

[4] After his resignation, Mr. Fernandes moved to Saskatchewan and then to Manitoba. After moving to Manitoba, he filed his initial statement of claim in Winnipeg, Manitoba, on May 1, 2015, and immediately served it on an assistant manager of a Wal-Mart store in Winnipeg. He filed an amended statement of claim on October 7, 2015, which was also served on a manager at a Wal-Mart store in Winnipeg.

[5] The amended claim raises many alleged wrongs that Mr. Fernandes claims to have suffered, both during his employment and, to a small extent, following, that form the basis of his complex legal claims which include constructive dismissal, breach of fiduciary duty, unjust enrichment, *quantum meruit*, infliction of mental suffering, intimidation and negligent

misrepresentation. He is claiming damages of over $50,000,000, including punitive and exemplary damages.

[6] Wal-Mart filed an affidavit in support of this motion, but, because it is challenging this Court's jurisdiction, it has not yet filed a defence.

III. THE MOTION JUDGE'S DECISION

[7] The motion judge found that the leading authority governing the motion regarding jurisdiction *simpliciter* was *Club Resorts Ltd v Van Breda*, 2012 SCC 17. Based on that decision, he found that Wal-Mart's domicile or residence in Manitoba and its carrying on business in Manitoba, in addition to whether a tort was committed in Manitoba and whether a contract connected with a dispute was made in Manitoba, were presumptive connecting factors that prima facie entitled the Manitoba court to assume jurisdiction over a dispute. He stated:

> . . . In cases where a recognized presumptive connecting factor applies, the court should assume that it is properly seized of the subject matter litigation, unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor.

[8] He found that the claims and the evidence in the motion did not disclose any facts that would connect the claims to Manitoba and that the only factor that presumptively connected the action to Manitoba was the fact that Wal-Mart carried on business in the province. He stated that, "just by operating stores in the Province of Manitoba, there is no creation of a connection in a real sense, or a relationship between the subject matter of this action and the Province of Manitoba."

[9] This led him to hold that, in these circumstances, the presumption of jurisdiction raised by Wal-Mart carrying on business in Manitoba had been rebutted and that Wal-Mart had succeeded in proving that there was no jurisdiction *simpliciter* to proceed with the action in the Manitoba court. He dismissed the action and did not address the motion for a stay based on *forum non conveniens*.

IV. JURISDICTION *SIMPLICITER*

(a) The Parties' Positions

[10] Mr. Fernandes's position is that the applicable law regarding jurisdiction *simpliciter* is that set out by the Supreme Court of Canada in *Chevron Corp v Yaiguaje*, 2015 SCC 42. He argues that, while the cases culminating in *Van Breda* defined jurisdiction *simpliciter* based on a real and substantial connection between the subject matter of the action and the state or province, that did not displace the traditional grounds for determining jurisdiction, the most common being presence-based jurisdiction and consent-based jurisdiction. The law, according to Mr. Fernandes, is that it is not necessary to consider the real and substantial connection ground if the facts establish one of the traditional grounds of jurisdiction.

[11] Mr. Fernandes argues that the Manitoba courts have jurisdiction *simpliciter* to hear his action on the basis of presence-based jurisdiction. He argues, and there is no doubt, that Wal-Mart is carrying on business in Manitoba in a substantial and ongoing manner at several locations, and that he served the claim on Wal-Mart at one of its business locations in Manitoba.

[12] Wal-Mart argues that the only ground for jurisdiction *simpliciter* in relation to the determination of the merits of a claim is that of a real and substantial connection set out in *Van Breda*, which, it argues, has replaced the traditional grounds for jurisdiction.

[13] Wal-Mart's position is that, based on *Van Breda*, a defendant's residence or domicile in a state or carrying on business in a state are only presumptive connective factors that can be rebutted by evidence of a weak or non-existent connection between that state and the dispute. It argues that, in this case, its business in Manitoba has no connection at all to the dispute and that, as a result, there is no real and substantial connection sufficient to meet the requirements in *Van Breda* for jurisdiction *simpliciter*.

[14] Wal-Mart further argues that *Chevron* was dealing with an action to recognize and enforce a foreign judgment in Ontario, not an action to litigate the merits of a claim. Its position is that this difference engages different jurisdictional rules and that the decision in *Chevron*, dealing with recognition and enforcement, does not apply in this case, where the issue is the determination of liability on the merits of the claim.

(b) Standard of Review

[15] The only issue related to jurisdiction *simpliciter* is whether the motion judge erred in his interpretation and application of the law. This is a question of law for which the standard of review on appeal is correctness. (See *Housen v Nikolaisen*, 2002 SCC 33.)

(c) Analysis

[16] At issue here is the determination of the available grounds for a court's jurisdiction *simpliciter* to determine an action regarding the merits of a claim (jurisdiction over the merits), as opposed to jurisdiction to determine an action to recognize and enforce a foreign judgment (enforcement jurisdiction), the merits of which have already been determined in a foreign jurisdiction. The correct interpretation and application of the decision in *Chevron* as it relates to *Van Breda* is an integral part of that determination.

[17] The facts in *Chevron* are that plaintiffs in Ecuador obtained a significant judgment in Ecuador on the merits of its action against Chevron Corporation (Chevron) for damages for environmental pollution caused by the exploration and extraction of oil. Chevron refused to acknowledge or pay the considerable debt and it did not hold any assets in Ecuador, so the plaintiffs took proceedings in other jurisdictions to enforce their judgment. This included instituting an action in Ontario against Chevron and Chevron Canada for the recognition and enforcement of the Ecuadorian judgment.

[18] Chevron Canada, a wholly owned subsidiary of Chevron, was not a party to the Ecuadorian litigation but was served *in juris* at its Mississauga office under Rule 16.02(1)(c) of the Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, which requires that personal service be made on a corporation "by leaving a copy of the document . . . with a person at any place of business of the corporation who appears to be in control or management of the place of business." (See *Chevron* at para 10.)

[19] Both Chevron and Chevron Canada opposed the recognition and enforcement of the Ecuadorian judgment on the basis that *Van Breda* applied

to the determination of the enforcement jurisdiction and there was no real and substantial connection between the subject matter of the action and Ontario and, therefore, no jurisdiction upon which to proceed with enforcement. Chevron Canada also took the position that there was no jurisdiction to proceed against it in Ontario because it was a stranger to the Ecuadorian litigation and no judgment had been rendered against it in Ecuador.

[20] In determining whether the real and substantial connection ground applied to an action to recognize and enforce a foreign judgment, Gascon J, for the Court, looked at the prerequisites to granting an enforcement order. He stated (at para 27):

> . . . To recognize and enforce [a foreign] judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied.
>
> [emphasis added]

[21] Thus, the jurisdiction of the foreign court over the merits of the action is a requirement when determining jurisdiction over enforcement by another state. It is clear that Gascon J was addressing the jurisdiction of the foreign court to determine the merits of the action when he stated that the foreign court would have jurisdiction over the merits based on either a real and substantial connection or one of the traditional bases.

[22] Gascon J went on to review the history of the development of the real and substantial connection ground. He noted that, prior to 1990, a foreign judgment would only be recognized and enforced if the defendant to the action on the merits had been present in the foreign province or had consented to that court's jurisdiction—the traditional bases of jurisdiction (see para 29). He

stated that, "In *Morguard* [*Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077], LaForest J., writing for the Court, held that the judgments of another province could and should also be recognized and enforced where the other province's court assumed jurisdiction on the basis of a real and substantial connection between the action and that province" (emphasis added) (at para 30). Thus, the real and substantial connection ground was developed as an alternative to the traditional grounds for determining the jurisdiction of the foreign court over the merits, not as a replacement ground.

[23] Gascon J explained this further when looking at the purpose of recognition and enforcement proceedings (at para 54):

> First, in recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. The judgment debtor is free to make this argument in the recognition and enforcement proceedings, and indeed will have already had the opportunity to contest the jurisdiction of the foreign court in the foreign proceedings.
>
> [emphasis added]

[24] Thus, he clearly stated that the jurisdiction of the foreign court over the merits of an action could be established either on the basis of a real and substantial connection or on one of the traditional bases of presence or attornment.

[25] Chevron Canada argued, in addition, that, where jurisdiction over a corporation is based on carrying on business in the jurisdiction rather than being domiciled there, *Van Breda* should apply, such that the Ontario courts

would have jurisdiction only if there was a connection between the subject matter of the claim and the business conducted in the province. It argued that carrying on business from an office was only a presumptive connecting factor that could be rebutted by showing that there was no connection between the subject matter of the claim and the business being conducted by the corporation in the province (see para 79). This is the same argument now being made by Wal-Mart.

[26] Gascon J rejected that argument, stating (at para 81):

> I do not accept Chevron Canada's submissions. *Van Breda* specifically preserved the traditional jurisdictional grounds of presence and consent. Chevron Canada erroneously seeks to conflate the rules on presence-based jurisdiction and those on assumed jurisdiction, even though they have always developed in their respective spheres. Here, presence-based jurisdiction is made out on the basis of Chevron Canada's office in Mississauga, Ontario, where it was served *in juris*. . . .

[27] It should be noted that *Van Breda* was a case dealing with jurisdiction over the merits of an action, not an action to recognize and enforce a foreign judgment. Gascon J explained the relationship between *Van Breda* and the traditional grounds of jurisdiction (at paras 82-84, 87):

> *Van Breda* was a case about assumed jurisdiction, one of three bases for asserting jurisdiction *in personam* over an out-of-province defendant. The other two bases, known as the "traditional" jurisdictional grounds, are presence-based jurisdiction and consent-based jurisdiction . . .
>
> Chevron Canada's appeal concerns the traditional ground of presence. Presence-based jurisdiction has existed at common law for several decades; its historical roots "cannot be over-emphasized". . . . It "is based upon the requirement and sufficiency of personal service of the originating process within

> the province or territory of the forum (service *in juris*)". . . . If service is properly effected on a person who is in the forum at the time of the action, the court has jurisdiction regardless of the nature of the cause of action. . . . Assumed jurisdiction, for its part, emerged much later and developed through the adoption of rules for service *ex juris*. . . . When a court finds that it has jurisdiction on this basis, that jurisdiction is limited to the specific action at issue before it.
>
> While *Van Breda* simplified, justified, and explained many critical aspects of Canadian private international law, it did not purport to displace the traditional jurisdictional grounds. LeBel J. explicitly stated that, in addition to the connecting factors he established for assumed jurisdiction, "jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established". . . . In other words, "[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction" . . .
>
> . . . As several lower courts have noted both prior to and since *Van Breda*, where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists. . . . In other words, the question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction in this case.
>
> [emphasis added]

[28] Gascon J cited three lower court decisions as supporting the proposition that, where jurisdiction is based on a defendant's presence, there is no need to consider whether a real and substantial connection exists, those three cases being: *Incorporated Broadcasters Ltd v Canwest Global Communications Corp*, 2003 CarswellOnt 601 (CA); *Patterson et al v EM Technologies, Inc et al*, 2013 ONSC 5849; and *Prince v ACE Aviation Holdings Inc*, 2014 ONCA 285. None of these cases dealt with an action to recognize and enforce a foreign judgment; rather, each dealt with a challenge

to the jurisdiction of the Ontario court to determine an action based on its merits. See, to similar effect, the Ontario Court of Appeal's decisions in *Zhang v Hua Hai Li Steel Pipe Co Ltd*, 2013 ONCA 103; and *Eco-Tec Inc v Lu*, 2015 ONCA 818 at para 12, leave to appeal to SCC refused, 2016 CarswellOnt 7208. This Court endorsed this interpretation of the application of the real and substantial connection test in *Ward v Canada (Attorney General) et al*, 2007 MBCA 123 at paras 41-46.

[29] Academic commentary also holds that the traditional grounds continue to apply, in addition to the ground of real and substantial connection. In that regard, see: Janet Walker & founding author Jean-Gabriel Castel, *Castel & Walker: Canadian Conflict of Laws*, 6th ed (Toronto: LexisNexis Canada, 2005) (loose-leaf including update issues 2005-2016) ch 11; Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 56, 61-62, 94; Joost Blom, "New Ground Rules for Jurisdictional Disputes: The Van Breda Quartet" (2012-2013), 53 Can Bus LJ 1; Brandon Kain, Elder C Marques & Byron Shaw, "Developments in Private International Law: The 2011-2012 Term—The Unfinished Project of the Van Breda Trilogy" (2012) 59 SCLR (2d) 277-311 at para 26; Tanya Monestier, "(Still) A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013) Roger Williams University School of Law Research Paper No 136, 36 Fordham Int'l LJ 397 at 447; and Joel Reinhardt & Aweis Osman, "Chevron Corp v Yaiguaje: Expansion of Canada's Generous and Liberal Approach in the Recognition and Enforcement of Foreign Judgments" (2016) 45 Adv Q 339 at 348-349.

[30] Wal-Mart also raises a constitutional argument, stating that *Van Breda* demonstrates "the SCC's intention to articulate the [real and substantial

connection] test as a broad, constitutionally-valid framework within which *all* disputes regarding jurisdiction must be analyzed, including when a defendant is present in the jurisdiction where a claim has been brought."

[31] This argument was also raised by Chevron Canada and addressed by Gascon J (at para 89):

> In my view, the real and substantial test as a constitutional principle does not dictate that it is "illegitimate" to find jurisdiction over Chevron Canada in this case. Chevron Canada has elected to establish and continue to operate a place of business in Mississauga, Ontario, at which it was served. It should therefore have expected that it might one day be called upon to answer to an Ontario court's request that it defend against an action. If a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved. As the Ontario Court of Appeal put it in *Incorporated Broadcasters Ltd.*, at para. 33, "[t]here is no constitutional impediment to a court asserting jurisdiction over a person having a presence in the province", at least as presence is established in this case. To accept Chevron Canada's submission to the contrary would be to endorse an unduly "narrow" view of jurisdiction, one towards which this Court has shown no prior inclination: J. Blom, "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2012), 53 *Can. Bus. L.J.* 1, at p. 12. For Ontario courts to have jurisdiction over Chevron Canada in this case, mere presence through the carrying on of business in the province, combined with service therein, suffices to find jurisdiction on the traditional grounds. There is no need to resort to the *Van Breda* criteria for assumed jurisdiction in tort claims in such a situation. To accept Chevron Canada's submissions would be to permit a total conflation of presence-based and assumed jurisdiction. As Briggs has noted, "[c]ommon law jurisdiction draws a fundamental distinction between cases where the defendant is and is not within the territorial jurisdiction of the court when the proceedings are commenced": p. 112.
>
> [emphasis added]

[32] As already noted above, *Incorporated Broadcasters Ltd*, which Gascon J cited with approval in support of his position, deals with jurisdiction over the merits of the action, not jurisdiction to enforce a foreign judgment.

[33] Wal-Mart points to the Supreme Court of Canada's decision in *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30, as supporting its interpretation of *Chevron*. Its argument is that, in *Lapointe*, the Court decided the question of jurisdiction related to all of the Quebec defendants on the basis of a real and substantial connection. It points out that two of the Quebec defendants had a presence in Ontario, yet the Court did not find jurisdiction in relation to those defendants based on their presence in Ontario, and its argument is that, if presence-based jurisdiction were available, the Court would not have needed to resort to the real and substantial connection ground in relation to those defendants.

[34] I would reject this argument for several reasons. First, the three alternative bases for jurisdiction are not mutually exclusive—it may be that jurisdiction can be established on two, or even all three, bases. Thus, a finding of jurisdiction on the basis of a real and substantial connection does not mean that there was no jurisdiction on either or both of the traditional bases.

[35] Second, there is no indication that the question of presence-based jurisdiction was argued before the Supreme Court. It is not mentioned in the facta that were filed or in the decision. Thus, it does not appear to have been at issue before the Court.

[36] Third, in *Lapointe*, there was a very practical reason for resolving the question of jurisdiction on the basis of the real and substantial connection ground, being that of judicial economy. Only two of 32 Quebec defendants

who appealed the jurisdictional ruling to the Supreme Court had a presence in Ontario, so deciding jurisdiction on the basis of a presence in Ontario would not have determined the appeal for the majority of them. If, however, jurisdiction could be established on the basis of a real and substantial connection, that would establish jurisdiction for all of them. Thus, it was more practical to determine whether there was jurisdiction on the basis of a real and substantial connection for all appellants and no need to deal with presence-based jurisdiction for only two of them.

[37] Finally, the Supreme Court of Canada went into significant detail in *Chevron* to explain that the traditional bases of jurisdiction remained in effect and had not been subsumed by the real and substantial connection ground. It is difficult to see how that decision could be overturned by a later decision that does not state or suggest that it is doing so. In fact, the majority does not even mention *Chevron* in its reasons, and Côté J, in her dissent, mentions it only tangentially, for another purpose.

[38] Wal-Mart refers to two other decisions that it argues support its position that the real and substantial connection ground has replaced the presence-based ground. In my view, those cases do not support that argument because, in neither case, do the facts indicate that there was presence-based jurisdiction and, further, it does not appear that presence-based jurisdiction was either raised in the motions or argued by the parties. In the first, being *Tyoga Investments Ltd v Service Alimentaire Desco Inc*, 2015 ONSC 3810, aff'd 2016 ONCA 15, the defendant was a Quebec corporation that did not have an office in Ontario and was served *ex juris* in Quebec. In the second, being *Stuart Budd & Sons Limited v IFS Vehicle Distributors ULC*, 2016 ONSC 2980, aff'd 2016 ONCA 977, the statements of claim were served *ex*

juris and the Ontario Court of Appeal noted that there was a "factual dispute about the degree of presence" (at para 11) of the defendants in Ontario. Thus, there is no basis to this argument.

[39] In summary, the Court in *Chevron* went into significant detail to explain the relationship between the *Van Breda* real and substantial connection ground for jurisdiction *simpliciter* and the traditional grounds for jurisdiction, concluding that both continue to coexist. Further, it soundly rejected the argument that jurisdiction to proceed against a corporation based solely on it carrying on business in the province was only a presumptive connecting factor that could be rebutted if there was no connection between the subject matter of the claim and the business being carried on. Finally, there is nothing in the reasons that suggest that they should be limited in application to an action for the recognition and enforcement of a foreign judgment. In my view, it is clear that they apply equally to the determination of jurisdiction as it relates to an action on the merits of a claim.

(d) Conclusion

[40] In conclusion, I would find that the motion judge erred in law by deciding the motion regarding the Court's jurisdiction on the ground of a real and substantial connection and failing to consider whether there was jurisdiction on the traditional ground of presence within the jurisdiction. In fact, Mr. Fernandes's arguments in relation to *Chevron*, a very recent and detailed decision from the Supreme Court of Canada that was exactly on point, and presence-based jurisdiction were not even mentioned by the motion judge in his reasons.

[41] In this case, it is uncontested that Mr. Fernandes was able to serve Wal-Mart *in juris* in compliance with the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, r 16.02(1)(c) and (e), on the basis that Wal-Mart was carrying on business in Manitoba. Any arguments regarding the allegedly tenuous nature of the connection between the action and the Manitoba courts are better suited to being analyzed under the doctrine of *forum non conveniens*.

[42] For the reasons set out above, I would find that Mr. Fernandes has established that the Manitoba courts have jurisdiction *simpliciter* to hear the action on its merits, and the motion for a dismissal for lack of jurisdiction should be dismissed.

V. *FORUM NON CONVENIENS*

(a) The Parties' Positions

[43] Wal-Mart's position is that the Manitoba proceedings should be stayed because Ontario is the more appropriate forum for determining the claim. In particular, it states:

- the factors of the location of the parties and location where it carries on business are neutral factors;

- all of the claims except that of intimidation (the original claims) arose and caused damage to Mr. Fernandes in Ontario;

- the claim of intimidation is an "ill-described" claim that was filed for the purpose of "bootstrapping" Mr. Fernandes's argument for finding that the claim should proceed in Manitoba and should form

no part of the analysis;

- all of the key witnesses and evidence for the original claims are located in Ontario, such that a trial in Manitoba will both significantly inconvenience it and cause it to incur a significant and unnecessary expense;

- the law of Ontario will apply to the original claims;

- Mr. Fernandes's suggestion that he is impecunious and would suffer an inconvenience if required to litigate in Ontario should be "taken with a grain of salt" given his evidence that he received legal advice in Ontario and intends to bring an Ontario action if his Manitoba action is stayed.

[44] Mr. Fernandes stated, in argument, that he is now statute-barred from commencing proceedings in Ontario, so that a stay in Manitoba will, effectively, end his claim. While Wal-Mart agreed, in argument, that this was probably the case, its position is that Mr. Fernandes's decision not to commence a claim in Ontario to avoid having his claim statute-barred was a tactical decision that should be given little or no weight in this analysis.

[45] Mr. Fernandes's position is that his proceeding should not be stayed in favour of Ontario for four reasons, the first two of which would result in him not being able to pursue his original claims. Firstly, he lives in Manitoba, where he has now lived for some time, and says that he is impecunious and cannot afford to litigate in Ontario. He says that, if required to commence the proceedings in Ontario, he could not proceed with the claims, which, he argues, is against the interests of justice.

[46] Second, he raises the issue of his original claims being statute-barred in Ontario. He says that, at the time that he commenced his claim, he could not afford to commence proceedings in both Ontario and Manitoba, and he felt that he had a strong case to pursue in Manitoba. He says that he did not anticipate the delay in hearing Wal-Mart's motion in the Court of Queen's Bench, where there was a one-year delay to obtain a hearing date after all of the material was filed and the matter was ready to proceed. He thought that the motion would be resolved before his limitation period in Ontario expired.

[47] Third, he says that he did not commence proceedings in Ontario for a tactical reason—being that he thought that it would prejudice his position that the Manitoba courts should hear his claim if he had a simultaneous proceeding filed in Ontario.

[48] Finally, he argues that the added claim of intimidation arose in Manitoba and involved five witnesses, all of whom reside in Manitoba. He argues that he cannot afford to have these witnesses travel to Ontario for a trial there.

(b) The Law

[49] LeBel J reviewed the principles of the doctrine of *forum non conveniens* in *Van Breda* (see paras 101-12). In summary, they are:

- The burden is on the defendant to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. (See para 103.)

- The party asking for the stay on the basis of *forum non conveniens* must show that the alternative forum is clearly more appropriate. (See para 108.) This test has been interpreted as follows (at para 109):

> The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. . . . The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

- The factors that a court may consider may vary with the context of the case, and might include: the locations of the parties and witnesses; the cost of transferring the case to another jurisdiction or of declining a stay; the impact of a transfer on the conduct of the litigation or on related and parallel proceedings; the possibility of conflicting judgments; problems related to the recognition and enforcement of judgments; and the relative strengths of the connections to the two parties. (See para 110.)

(See, also, this Court's decision in *Henry Estate v Henry*, 2012 MBCA 4 at paras 20-22, 47; and Castel & Walker at para 13.5.)

[50] Of particular importance, in my view, is the effect of what appears to be the likelihood that Mr. Fernandes's claim is statute-barred in Ontario, so that a stay in favour of Ontario will, effectively, terminate the proceedings.

[51] The effect of the loss of the right to sue in an alternative forum due to the expiration of the limitation period is considered by the courts under the rubric of juridical advantage/disadvantage. Pitel states as follows (at pp 135-37):

> The courts have identified different possible advantages. One of these concerns limitation periods. If the plaintiff has commenced proceedings in the forum within the applicable limitation period but is outside the time for suing in the alternative forum, a decision to stay the forum's proceedings will effectively put an end to the litigation in both forums. The plaintiff's claim will be time-barred in the *forum conveniens*. In such cases plaintiffs have claimed a juridical advantage in being able to maintain the action in the chosen forum. The courts have not adopted an all-or-nothing approach to this issue. Rather, they have asked whether it was reasonable for the plaintiff not to have commenced proceedings within the limitation period in the alternative forum. Because multiple forums may have jurisdiction, it is open for the plaintiff to commence proceedings in respect of the same claim in different countries and to then choose to move ahead either in his or her preferred forum or in whichever forum remains after jurisdictional challenges. A plaintiff who does not recognize an obvious *forum conveniens* and start proceedings there, even if only to guard against the running of the time bar, runs the risk of the court in the chosen forum [p 136] concluding that he or she did not act reasonably and therefore staying the proceedings. On the other hand, if the court is satisfied that the plaintiff has acted reasonably, it would be unusual for it to force the plaintiff into a jurisdiction where the claim is barred.
>
> . . .
>
> In *Club Resorts* the Supreme Court of Canada commented on the role of juridical advantage. It suggested that this factor should,

> in the interests of comity between jurisdictions, be downplayed or given a reduced role, especially in interprovincial cases [see para 112]. In *Breeden* the same [p 137] court stated that '[j]uridical advantage therefore should not weigh too heavily in the *forum non conveniens* analysis.' While these comments indicate a need for caution, they do not preclude continued reliance on juridical advantage considerations in appropriate cases. A court that recognizes a legitimate juridical advantage is not, simply by doing so, improperly favouring the domestic forum and showing a homeward bias. Overall, decisions since *Club Resorts* and *Breeden* have continued to consider juridical advantage in the analysis in much the same way as in earlier cases, though references to the need to respect comity have increased. . . .
>
> [footnotes omitted]

(See: *Oliveira v Manitoba Public Insurance Corporation*, 2009 ONCA 435; *West Van Inc v Daisley*, 2014 ONCA 232; *Coady v Quadrangle Holdings Ltd*, 2015 NSCA 13, leave to appeal to SCC refused, 2015 CarswellNS 841; and *Garcia v Tahoe Resources Inc*, 2017 BCCA 39, leave to appeal to SCC refused, 2017 CarswellBC 1553. For further academic commentary, see Walker at para 13.5(b).)

[52] In several decisions, the courts have found that the expiration of a limitation period in an alternative jurisdiction resulting from a plaintiff's choice not to bring a protective action should not be given much, if any, weight as a factor in favour of dismissing a defendant's motion for a stay. (See, for example, *Cortese v Nowsco Well Service Ltd*, 2000 ABCA 124 at para 7, leave to appeal to SCC refused, 2000 CarswellAlta 1289; *Hurst v Socit Nationale de L'Amiante*, 2008 ONCA 573 at paras 51-52; *West Van Inc* at paras 3, 35, 37; and *Cook v 1293037 Alberta Ltd (Traveller's Cloud 9)*, 2016 ONCA 836 at para 9.)

(c) Analysis

[53] The factors weigh heavily in favour of a finding that Ontario is the *forum conveniens* for the hearing of this action. In that regard, I note the following:

- all except one of the numerous claims arose in Ontario, the witnesses relevant to those claims, except Mr. Fernandes, are all in Ontario, and it is likely that Ontario law would apply;

- Wal-Mart would be put to considerable expense to arrange for its witnesses—at least 17 in number—to travel from Ontario to Manitoba for a trial; this compares with the four Brandon witnesses that Mr. Fernandes states would be called regarding the intimidation claim;

- the one claim that arose in Manitoba, being the intimidation claim, is not a major part of the overall proceeding; it is not defined in the pleading with any specificity or explained by any supporting facts—it is, as described by the motion judge, "simply a bald allegation".

[54] Mr. Fernandes has also argued that he cannot afford to pursue litigation in Ontario because he is impecunious. In considering the weight to give this argument, I note the following:

- Aside from making that assertion, Mr. Fernandes has provided no evidence to support his financial situation. That said, Wal-Mart has not challenged this assertion.

- It is clear that Mr. Fernandes will incur some travel expenses wherever the matter proceeds, given that he has commenced his action in Winnipeg and he and his five witnesses live in Brandon.

- Looking at the claims, the testimony of Mr. Fernandes's five witnesses is limited to the intimidation claim and it does not look to be either lengthy or complex. There are facilities to reduce the cost of trials in both Manitoba and Ontario, like taking evidence by video conference, that may well assist Mr. Fernandes in reducing his cost.

- By comparison, the evidence in the original claims is much more lengthy and complex and involves many more witnesses—at least 17, according to Mr. Thomas's affidavit, making it relatively more difficult to have their evidence taken by video conference.

- The original claims form the most significant part of the action, and, as a result, facilitating those claims weighs much more heavily in the determination of the most convenient forum than does the facilitation of the intimidation claim.

- A stay of the action is not a dismissal. It may be that Mr. Fernandes could sever the intimidation claim from the balance of the action and proceed with that claim in Manitoba, obviating the need to have any witnesses travel to Ontario. As no particulars of the intimidation claim appear in the amended statement of claim, its connection to the original claims is not evident.

[55] Thus, while I am somewhat sympathetic to Mr. Fernandes's claim of impecuniosity, I don't find it to be determinative.

[56] The limitation issue is more complex. While it was not made clear at the hearing, it appears that Ontario law would apply to at least the original claims, whether heard in Ontario or Manitoba. The employment contract was entered into and performed entirely in Ontario, which is where the alleged breach occurred. The torts, with the exception of the intimidation, also occurred exclusively in Ontario.

[57] If Ontario law applies, limitations law is substantive law (see the *Limitations Act*, SO 2002, c 24, section 23). The basic limitation period, and the one that would apply to the original claims, is two years from the discovery of the claim (see the *Limitations Act*, sections 2, 4-5). As the original claim was filed in Manitoba less than six months after the relevant events, it is clearly within the two-year Ontario limitation period. Thus, there can be no suggestion that Mr. Fernandes was forum shopping by commencing his claim in Manitoba to gain a juridical advantage from a longer limitation period or to avoid an expired limitation period in Ontario.

[58] Where Mr. Fernandes ran into trouble was in not filing a protective claim in Ontario when the Ontario limitation period of two years was drawing to a close and he had not received a decision on this motion regarding Manitoba's jurisdiction.

[59] Mr. Fernandes explained why he chose not to file a claim in Ontario—he understood that the test for *forum non conveniens* requires the court to consider whether there is litigation outstanding in another jurisdiction, and, if he had an Ontario proceeding outstanding, that would prejudice his argument that the matter should be heard in Manitoba. Whether or not that is the case, Mr. Fernandes clearly put his mind to the issue of whether to file a

protective claim in Ontario and made a decision not to do so for tactical reasons. The risk of that decision was that his Manitoba claim would be stayed in favour of Ontario and he would be faced with a limitation defence to a new proceeding in Ontario.

[60] Mr. Fernandes understood the risk and, notwithstanding that risk, he chose that course of action. Given that choice, in my view, he now has to live with the result. I would give little weight to his argument that a stay in Manitoba should be refused because an action in Ontario might be statute-barred.

(d) Conclusion

[61] After weighing all of the factors relevant to the issue of *forum non conveniens*, I am satisfied that Ontario is clearly the most convenient forum for the hearing of this action. Manitoba has a connection to only one of many claims, and that claim appears to be the least complex of the claims. While Mr. Fernandes may have difficulty meeting the cost of litigation in Ontario, the major cost would be travel costs for his five witnesses, which could possibly be resolved by taking their testimony by an alternative to personal appearance. Finally, the issue of the juridical disadvantage arising out of the probable expiration of the limitation period in Ontario was the result of a tactical decision on Mr. Fernandes's part, and I would give it little weight.

[62] For these reasons, I would grant Wal-Mart's motion and stay the action in Manitoba in its entirety.

VI. COSTS

[63] The parties did not address the issue of costs on the appeal or request costs in their facta. While the general rule is that costs will follow the cause, on the facts of this case, we are of the view that each party should bear his or its own costs. Thus, there will be no order for costs on the appeal.

Beard JA

I agree: Steel JA

I agree: leMaistre JA