

## Establishing Jurisdiction Through E-Commerce

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For many years now, consumer transactions have been conducted over the Internet, sometimes with companies in faraway places. With the prevalence of e-commerce, more and more questions are arising over whether a business which has no physical presence in a jurisdiction can be sued in that jurisdiction, if it engages consumers through the Internet.

This issue was front and centre in the Ontario Court of Appeal's recent decision in [Vahle v. Global Work & Travel Co. Inc.](#), 2020 ONCA 224.

### **Background**

Two sisters from Ontario went to Thailand to teach English. The teaching program was organized by the defendant.

While riding a motor scooter, the sisters were struck by a car. One sister died and the other sustained serious injuries. A lawsuit was commenced in Ontario.

The defendant is an international travel agency. Its parent company is based in Australia, and it has offices and employees in Vancouver, British Columbia.

The defendant argued that the Ontario court lacked jurisdiction and that Ontario was not the convenient forum.

### **Motion Decision**

Justice Schabas noted that the onus lies on a plaintiff to show that at least one of the presumptive connecting factors can be established. The presumptive connecting factors were outlined by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572:

- The defendant is domiciled or resident in the province.
- The defendant carries on business in the province.
- The tort was committed in the province.
- A contract connected with the dispute was made in the province.

Justice Schabas held that two of the presumptive connecting factors applied.

First, there was at least a “good arguable case” that a tort was committed in Ontario. A misrepresentation by the defendant may have occurred in Ontario. The tort of negligent misrepresentation is committed “where the representation is received and relied upon”. Further, the defendant’s conduct following the accident could give rise to claims of negligence involving steps that it took or ought to have taken in Ontario.

Secondly, although the defendant does not have a physical presence in Ontario, Justice Schabas noted that it engages in e-commerce in Ontario by contacting and contracting with travellers in Ontario. There was a “good arguable case” that the defendant carries on business in Ontario.

As a result, it was presumed that Ontario has jurisdiction. Justice Schabas held that the defendant did not rebut the presumption.

Justice Schabas then examined the question of *forum non conveniens* and held that the defendant did not satisfy the burden of showing that Thailand was clearly the more appropriate forum for the lawsuit.

### ***Appeal Decision***

On appeal, the Court of Appeal found no error in the motion judge’s findings related to the torts of negligent misrepresentation and negligence having been committed in Ontario.

The Court of Appeal stated that a motion judge is not to assess the merits of a case. Rather, he or she must be at least satisfied that there is a “good arguable case” supporting a presumptive factor, taking into account the allegations in the Statement of Claim and the evidence, where evidence is led.

The requirement to have a “good arguable case” supporting a presumptive factor was easily met in this case. The sisters were in Ontario when they responded to Internet advertisements from the defendant.

The defendant was well aware that it was attracting Ontario clients through representations made in Ontario. The defendant represented that it would ensure the living, safety, security, and emergency needs of the sisters. At least some of the representations relied on were alleged to have been made to them in Ontario.

The presumption of Ontario having jurisdiction was not rebutted. In order to rebut a presumptive connecting factor, a defendant must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

The defendant argued that some of the alleged misconduct was that of a Thai company and other entities for which it is not responsible. The Court of Appeal indicated that, on a jurisdiction motion, it is not necessary for the Court to determine whether all of the alleged misconduct was that of the defendant or whether all of the alleged misconduct is connected to Ontario.

Rather, the questions are “whether the statement of claim asserts the core elements of a cause of action known to law and appears capable of amendment to cure any pleadings deficiencies and whether the claimant has established a good arguable case that the cause of action is sufficiently connected to Ontario to found jurisdiction”.

Lastly, the Court of Appeal saw no basis to interfere with the motion judge’s conclusion that the defendant did not prove that Thailand was clearly the more appropriate forum for the lawsuit.

As a result, the appeal was dismissed, and the claim will proceed in Ontario.

### ***Conclusion***

When companies conduct business through the Internet, they can sometimes be sued in Ontario, even if they have no physical presence in Ontario.

In the case in issue, the defendant contacted and contracted with travellers in Ontario. It actively solicited the business of Ontario residents and made representations to them.

Engaging in such activities may be sufficient for a court to find that there is a “good arguable case” that the defendant carries on business in Ontario and/or committed a tort in Ontario and is, thus, subject to the jurisdiction of the Ontario court.