NOVA SCOTIA COURT OF APPEAL
Citation: ***Bouch v. Penny***, 2009 NSCA 80

Date: 20090723
Docket: CA 307607
Registry: Halifax

Between:

Peter J. Bouch, William R. Young, Jared Yeung, Richard Moffatt and the David Thompson Health Region, a body corporate, carrying on business as the Red Deer Regional Hospital Centre

Appellants

v.

Caiden Christopher Penny, an infant, by his Litigation Guardian, Vicki Penny, and Vicki Penny

Respondents

Judges: Roscoe, Saunders and Oland, JJ.A.

Appeal Heard: June 10, 2009, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Saunders, J.A.; Roscoe and Oland, JJ.A. concurring.

Counsel: Daniel M. Campbell, Q.C. and Hilary A.N. Young, for the appellants Peter J. Bouch, William R. Young, Jared Yeung and Richard Moffatt
J. Mark Raven-Jackson, for the appellant David Thompson Health Region
Raymond Wagner and Michael Dull, for the respondents Caiden Penny and Vicki Penny

Reasons for judgment:

[1] The issue in this appeal is whether the Chambers judge erred in his interpretation and application of the **Court Jurisdiction and Proceedings Transfer Act**, S.N.S. 2003, c. 2, leading him to find that a medical malpractice action should be tried in Nova Scotia.

[2] This will be the first time we have pronounced on the subject under the new legislative regime.

[3] For the reasons that follow I would dismiss the appeal.

Background

[4] The respondent, Ms. Vicki Penny, is the mother of the infant Caiden Christopher Penny born in Alberta on July 17, 2004. Since his birth Caiden has been diagnosed with Spastic Dysplasia Cerebral Palsy.

[5] On January 31, 2008, Ms. Penny commenced an action in the Supreme Court of Nova Scotia both in her capacity as litigation guardian for her son Caiden and in her own personal capacity. She claims damages for medical malpractice against the four physicians in Alberta who treated her during her pregnancy and against the Alberta hospital where Caiden was born. None of the defendants has attorned to this jurisdiction by filing a defence or otherwise. All of the defendants (now appellants) say that Alberta is the proper forum for this litigation.

[6] The underlying facts in this appeal are not disputed. Ms. Vicki Penny was born and reared in Nova Scotia. She gave birth to her first child Connor, here in Nova Scotia in March, 2001.

[7] After completing college Ms. Penny moved to Alberta in July, 2003 in search of employment. A few months later she became pregnant with Caiden. This second pregnancy was a difficult one which required prenatal care offered at various times by each of the appellants, Dr. Peter J. Bouch, Dr. William R. Young, Dr. Jared Yeung, and Dr. Richard Moffatt, who are all physicians licensed to practise medicine in Alberta.

[8] On July 16, 2004, Ms. Penny noticed a decrease in fetal movement. The next day she felt her baby hiccup and noted the baby had not moved for a few hours. Later that day she was admitted to the Red Deer Regional Hospital Centre, a hospital run by the David Thompson Health Region, where she underwent an emergency caesarean section.

[9] It is common ground that at the time all of these medical services were provided, Ms. Penny was a resident of Alberta and as such had the benefit of Alberta Health Care coverage. Similarly, her baby Caiden was covered by Alberta Health Care benefits.

[10] After a six day stay at the Red Deer Regional Hospital, the baby was transferred to the Neonatal Intensive Care Unit at the Stollery Children's Hospital in Edmonton for further tests and treatment. Those tests disclosed a number of neurological deficits. Physicians at that point were not able to give a definitive prognosis of what might develop.

[11] After a three week stay at the Children's Hospital in Edmonton, Ms. Penny and her sons Connor and Caiden moved back to Nova Scotia where the majority of her family still reside and where she would have the benefit of their support as a single mother. She and her children remained in Nova Scotia for almost a year during which time Caiden underwent further testing and treatments at the IWK Hospital in Halifax. By 2005, just before his first birthday, Caiden was diagnosed by his pediatric neurologist, Dr. Ellen Wood, with Spastic Dysplasia Cerebral Palsy.

[12] On July 29, 2005, Ms. Penny and her sons moved to Saskatchewan with her then fiancé. They took up residence there until October, 2007. By that time Ms. Penny and her fiancé had parted ways. She and her boys moved to Ontario so that she could provide support for a sick sister. They lived in Ontario temporarily from October, 2007 until June, 2008.

[13] It was during that period of Ontario residence when on January 31, 2008 this action was commenced in Nova Scotia and served upon the defendants *ex juris*.

[14] On June 12, 2008, the hospital filed an application pursuant to **Rules** 11.05(a) and 14.25(1)(d) of the Nova Scotia (1972) **Civil Procedure Rules**

seeking an order dismissing the action on the ground that there was no real and substantial connection between the subject-matter of the action and the jurisdiction of Nova Scotia, or in the alternative, seeking an order staying the proceedings on the ground that Nova Scotia was not the most appropriate forum for the action.

[15] Later in June, 2008, Ms. Penny and the boys moved back to Nova Scotia on a permanent basis. Her reason for doing so – as deposed in her affidavit and later confirmed during cross-examination at the hearing in Chambers – was to have the assistance and support of her family in rearing her two young sons, one with a severe disability.

[16] Since returning to live in Nova Scotia Ms. Penny has had Caiden assessed by the Cerebral Palsy Clinic at the IWK Hospital in Halifax. Thus far Caiden has been seen by seven medical specialists in Halifax for testing, surgery and other treatment of his condition. As for Ms. Penny, in September, 2008 she started work locally as a pizza cook on a full-time basis. She and her sons are now living in the once matrimonial home with the permission of her former husband, on the express understanding that Ms. Penny pay all household expenses. Her stated intention is to live in Halifax for the indefinite future in the belief that this is in the best interests of her children.

[17] These then were the facts before Justice Wright when he considered the hospital's application in Chambers. The hospital was supported in its application by the four defendant physicians.

Proceedings in the Court Below

[18] Wright, J. addressed three issues. He said:

> [13] The issues to be determined on this application can be framed as follows:
>
> (1) Is there a real and substantial connection between the subject matter of this lawsuit and the chosen forum such that this court has jurisdiction to hear the matter;
>
> (2) If so, should this court exercise its discretion to decline jurisdiction in favour of Alberta, be it the more appropriate forum; and

> (3) Does the Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003, c. 2 (the "Act"), which came into force on June 1, 2008, apply in the determination of these issues?

[19] The Chambers judge thought it sensible to answer the third question first, recognizing that the **Court Jurisdiction and Proceedings Transfer Act** (**Act**) had only come into force on June 1, 2008, some five months *after* the proceeding was commenced.

[20] Justice Wright held that the **Act** did apply to the determination of the matter before him. He was satisfied the statute was largely procedural in nature and therefore was intended to have immediate application. He said:

> [15] Briefly by way of background, the Act is modeled after the *Uniform Court Jurisdiction and Proceedings Transfer Act* published in 1994 by the Uniform Law Conference of Canada. One of the stated purposes of the *Uniform Act* is to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in **Morguard Investments Ltd. v. De Savoye** [1990] 3 S.C.R. 1077 and **Amchem Products Inc. v. British Columbia (Workers' Compensation Board)** [1993] 1 S.C.R. 897.
>
> [16] Thus far, the Nova Scotia Act is one of three such statutes to have been enacted in Canada, the others being in Saskatchewan and British Columbia. The Saskatchewan Act expressly applies only to proceedings commenced after the coming into force of the statute. No such provision appears in either the Nova Scotia or British Columbia Acts. Whether our Act applies to actions commenced before it came into force therefore becomes a matter of statutory interpretation.
>
> [17] While there are no decided cases in Nova Scotia as yet on this point, there are several to be found in British Columbia, both at the trial and appellate levels. One of the earlier cases is **Courcelles v. Rogers et al.**, [2006] B.C.J. No. 1424, 2006 BCSC 882 in which the court held that the Act is of immediate application and applies to the disposition of the matter notwithstanding the fact that it was enacted after the action was commenced. This conclusion has been repeatedly followed in other decisions by the British Columbia Supreme Court (see, for example **Tecnet Canada Inc. v. Unisys Canada Inc.**, [2006] B.C.J. No. 2025, 2006 BCSC 1321) and was cited with implicit approval by the British Columbia Court of Appeal in **MTU Maintenance Canada Ltd. v. Kuehne & Nagel International Ltd.**, [2007] B.C.J. No. 2433, 2007 BCCA 552.
>
> [18] The British Columbia decisions appear to have been decided on the footing that their *Court Jurisdiction and Proceedings Transfer Act* is in the nature

> of a procedural statute, resulting in the application of the common-law presumption that procedural legislation is intended to have immediate application (citing *Sullivan on the Construction of Statutes* (5th ed. at p. 696).
>
> [19] I adopt the reasoning of the British Columbia courts in similarly concluding that the Nova Scotia Act is substantially in the nature of a procedural statute having immediate application upon coming into force. I therefore find that the Act does apply in the determination of the present application although its outcome would be the same otherwise where the Act is largely a codification of common-law principles developed by the Supreme Court of Canada.

[21] No appeal has been taken from Justice Wright's determination of this preliminary issue. Accordingly our consideration of the merits of this appeal comes down to our view of his disposition of the other two issues.

[22] In denying the hospital's and physicians' application for an order either dismissing or staying the action, the Chambers judge was satisfied that the Nova Scotia Supreme Court had territorial competence. He went on to conclude that because Alberta was not shown to be a more appropriate forum, the court ought not to decline jurisdiction.

Issues

[23] The appellants allege a series of errors on the part of the Chambers judge which they say give rise to a number of discrete issues. The Notice of Appeal filed by the hospital lists seven grounds of appeal. The hospital says the judge erred in:

> (a) holding that the Nova Scotia Supreme Court had territorial competence over the subject matter of this proceeding;
>
> (b) improperly importing considerations of convenience of the plaintiffs into the determination of territorial competence;
>
> (c) failing to give effect to the provisions of the *Court Jurisdiction and Proceedings Transfer Act* with respect to territorial competence;
>
> (d) failing to determine that the Court of Queen's Bench of Alberta was a more appropriate forum than the Supreme Court of Nova Scotia for this proceeding;

(e) failing to give effect to the provisions of the *Court Jurisdiction and Proceedings Transfer Act* with respect to declining of jurisdiction and, in particular, applying a presumption in favour of the domestic forum unless the applicants show that Alberta is "clearly more appropriate";

(f) failing to recognize or give weight to any factors other than the convenience of the plaintiffs in determining the appropriate forum pursuant to s. 12 of the *Court Jurisdiction and Proceedings Transfer Act*;

(g) failing to assess the Court's territorial competence or the appropriate forum as of the time when the cause of action was complete, and inappropriately assessing factors which occurred only after the action was commenced and the application was made.

[24] In my view the merits of this appeal should be assessed by considering three questions:

(1) Did the Chambers judge err in his interpretation and application of the **Act** leading him to find that the Nova Scotia Supreme Court had territorial competence over the subject-matter of his proceeding?

(2) Did the Chambers judge err in failing to determine that the Court of Queen's Bench of Alberta was a more appropriate forum?

(3) Did the Chambers judge err in failing to consider the first two questions as of either the time of Caiden's birth, or the date this suit was commenced, and by taking into account factors which arose only *after* Ms. Penny started her law suit, and the hospital applied to have it dismissed?

[25] Before addressing each of these questions I will deal with the appropriate standard of review.

ANALYSIS

Standard of Review

[26] The parties to this appeal do not agree on the appropriate standard of review. The appellant hospital says that jurisdiction is a question of law which calls for a standard of review based on correctness, whereas the application of the doctrine of *forum non conveniens* is one where the judge "must carefully review and weigh each of the relevant factors" and so ought to be evaluated "on a reasonableness basis". The appellant physicians argue that each of the seven listed grounds of appeal constitute pure questions of law or extricable legal principles, therefore triggering a review on a standard of correctness. The respondent says the Chambers judge was required to employ the correct legal test when considering the existence of a "real and substantial connection". This exercise amounted to the application of a legal standard to a set of facts, thus constituting a question of mixed fact and law with a predominant factual component, prompting a standard of review based on palpable and overriding error. Further, the respondent says the interlocutory decision of the Chambers judge involved the exercise of discretion. Absent an error in principle or a patent injustice this Court will not interfere.

[27] I think the respondents' submissions are closer to the mark. To the extent that the Chambers judge was engaged in interpreting and applying the **Act** in deciding jurisdiction, his decision will be reviewed on a standard of correctness. **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235. On the other hand, to the extent that he was engaged in deciding the facts and applying a legal standard to those facts, his inquiry was largely factually driven and is one to which a high degree of deference is paid. Such parts of the Chambers judge's decision will be reviewed for palpable and overriding error. **McPhee v. Gwynne-Timothy**, 2005 NSCA 80; **McCormick v. MacDonald**, 2009 NSCA 12.

[28] For convenience I will reproduce here the relevant provisions of the **Act**:

> 1 This Act may be cited as the Court Jurisdiction and Proceedings Transfer Act.
>
> **Interpretation**
>
> 2 In this Act,
>
> (f) "subject-matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;
>
> ...

(h) "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

(i) the territory or legal system of the state in which the court is established, and

(ii) a party to a proceeding in the court or the facts on which the proceeding is based.

Part I

TERRITORIAL COMPETENCE OF COURTS OF NOVA SCOTIA

Territorial competence of court

3 (1) In this Part, "court" means a court of the Province unless the context otherwise requires.

(2) The territorial competence of a court is to be determined solely by reference to this Part.

Proceedings against persons

4 A court has territorial competence in a proceeding that is brought against a person only if

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;

(b) during the course of the proceeding that person submits to the court's jurisdiction;

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;

(d) that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or

(e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

...

Presumption of real and substantial connection

11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding

...

(g) concerns a tort committed in the Province;

...

12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

...
(Underlining mine)

[29] In disposing of the application before him, Justice Wright felt compelled to conduct a two-step analysis. He described it this way:

> [20] The Act clearly recognizes and affirms the two step analysis required to be engaged in whenever there is an issue over assumed jurisdiction, which arises where a non-resident defendant is served with an originating court process out of the territorial jurisdiction of the court pursuant to its Civil Procedure Rules. That is to say, in order to assume jurisdiction, the court must first determine whether it can assume jurisdiction, given the relationship among the subject matter of the case, the parties and the forum. If that legal test is met, the court must then consider the discretionary doctrine of *forum non conveniens*, which recognizes that there may be more than one forum capable of assuming jurisdiction. The court may then decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action.

[30] In my view the Chambers judge correctly described the required analytical framework.

[31] He then observed that of the five enumerated bases by which territorial competence could be established under s. 4 of the **Act**, only s. 4(e) was applicable. Wright, J. correctly concluded that the Nova Scotia Supreme Court would only have jurisdiction to try this action if he were satisfied that there existed a real and substantial connection between this province and the facts on which the proceeding against the hospital and the four physicians is based. If he were satisfied that the substantial connection test was met, then he would have to go on:

> to consider the discretionary doctrine of *forum non conveniens* under its new nomenclature of declining territorial competence.

[32] As Justice Wright recognized, s. 11 lists 12 different circumstances in which a real and substantial connection will be presumed to exist. He found – correctly in my view – that this case did not fall within any of those presumptive circumstances. He also correctly noted that s. 11 does not purport to create an exhaustive list. As the **Act** makes clear, the plaintiff is entitled to prove other circumstances which might establish the requisite connection. This is obvious from the opening words of s. 11, which I repeat:

> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based ...

[33] Wright, J. concluded that these opening words would lead him

> [26] ... back to a consideration of the factors or circumstances which the courts at common-law have taken into account in deciding cases involving assumed jurisdiction.

Then, citing such authorities as **Morguard Investments Ltd. v. De Savoye**, [1990] 3 S.C.R. 1077; **Amchem Products Inc. v. British Columbia (Workers' Compensation Board)**, [1993] 1 S.C.R. 897; **Muscutt v. Courcelles** (2002), 60 O.R. (3d) 20 (C.A.); **Oakley v. Barry**, [1998] N.S.J. No. 122 (Q.L.)(C.A.); and, **O'Brien v. Canada (Attorney General)**, 2002 NSCA 21 Wright, J. was satisfied, based on his analysis of a host of discrete factors, that the real and substantial connection test was met. He concluded:

> [57] As observed earlier, it is often the result that there is more than one forum capable of assuming jurisdiction. I conclude that this is one of those cases. After all of the foregoing factors are fairly weighed, guided as they are by the principles of order and fairness, I am satisfied that there is a real and substantial connection between this forum and the subject matter of the action and the parties. Of significant weight in this analysis is the connection between the forum and the plaintiffs' claim and the unfairness to the plaintiffs in not assuming jurisdiction.

[34] Justice Wright then embarked on the second step of the legal analysis mandated by s. 12. He properly recognized that ss.(2) did not represent an exhaustive list of factors. While he was obliged to consider "the circumstances relevant to the proceeding" these would include but not be limited to the six criteria enumerated therein. After considering the various features emphasized by the parties in support of their respective positions, Wright, J. applied this Court's decision in **Dennis v. Salvation Army Grace General Hospital Board**, [1997] N.S.J. No. 19 (Q.L.) and concluded at para. 73 as follows:

> [73] In going on to read the Court of Appeal's analysis in weighing the competing factors in **Dennis** (at paras. 42-44), I am guided to the conclusion that likewise here, it cannot be said that the defendants have established that Alberta is clearly a more appropriate jurisdiction to try this action, so as to deprive the plaintiffs of the benefit of an appropriate jurisdiction which they have selected. The best that can be said, as in **Dennis**, is that the factors which favour trial in Alberta, when weighed against the factors which favour trial in Nova Scotia, show that there is no one jurisdiction which is clearly more appropriate than the other for the trial of this action.

> [74] Since the selected forum wins out by default in that situation, according to Amchem, the defendants' application must fail, thereby enabling the plaintiffs to proceed with their action in this Court.

[35] I turn now to a review of the judge's reasons and disposition by considering the three questions I posed earlier.

(1) Did the Chambers judge err in his interpretation and application of the Act leading him to find that the Nova Scotia Supreme Court had territorial competence, the subject-matter of his proceeding?

[36] After completing the requisite two-step legal analysis Wright, J. – as noted above (see para. 33, **supra**) – concluded that *both* Nova Scotia and Alberta enjoyed a real and substantial connection to the subject-matter of the action and the parties to the litigation. He said:

> [57] As observed earlier, it is often the result that there is more than one forum capable of assuming jurisdiction. I conclude that this is one of those cases. After all of the foregoing factors are fairly weighed, guided as they are by the principles of order and fairness, I am satisfied that there is a real and substantial connection between this forum and the subject matter of the action and the parties. Of significant weight in this analysis is the connection between the forum and the plaintiffs' claim and the unfairness to the plaintiffs in not assuming jurisdiction.

[37] In reaching a decision which the appellants characterize as seriously flawed, the appellants put forward two principal arguments. First, they say the Chambers judge erred in law in considering the convenience of, and fairness to the respondents when determining the existence of territorial competence. The appellants argue that such considerations only come into play during the second step in the 2-step legal analysis, that being *forum non conveniens*. They say Wright, J. erred in failing to keep these two inquiries separate and distinct. Were it not for this error the appellants submit that the judge would have been driven to the conclusion that Alberta bore the only real and substantial connection to this litigation.

[38] Second, the appellants complain that the inquiry undertaken by the Chambers judge was focussed on the wrong point in time. Here, the appellants differ somewhat in their approach. At the appeal hearing counsel for the appellant

hospital argued that the moment at which territorial jurisdiction (competence) should be determined is at the point in time proceedings are commenced. In this case that was January 31, 2008 when, according to Ms. Penny's statement of claim, she and her children resided in Ontario. By contrast the appellant physicians submit that the moment in time for territorial jurisdiction (competence) to be evaluated is, in this case, the time when the alleged tort was "complete", that being the date of Caiden's birth, July 17, 2004.

[39] I will deal with the appellants' first argument concerning the judge's misguided emphasis upon fairness to Ms. Penny, now. Their second argument concerning the proper time to set the temporal clock when deciding jurisdiction is better addressed when I consider the third question I posed, at ¶ 24, *supra*.

[40] To better understand the appellants' first argument, it would be helpful to briefly summarize the position they took both before Justice Wright in Chambers, and repeated on appeal to this Court. They tried to persuade him that the **Act** ought to be interpreted as narrowing the parameters of the real and substantial connection test as it has developed in the common law. They say that Wright, J. was wrong to apply the decision of the Ontario Court of Appeal in **Muscutt, supra**. Counsel for the appellant physicians puts it this way in his factum:

> The Appellants submit that the CJPTA mandates a return to the principles enunciated by the Supreme Court of Canada in *Morguard Investments Limited v. DeSavoye* and *Amchem Products Incorporated v. British Columbia Workers' Compensation Board*, with a clear separation between the analysis of "jurisdiction *simpliciter*" and "*forum non conveniens*", and away from the overlapping and blurred analysis of *Muscutt*. In particular, the consideration of "fairness" to the parties is to be confined to the *forum non conveniens* analysis – it has no place in the determination of whether jurisdiction exists.

At the hearing we were urged by the appellants not to follow the approach taken by the Ontario Court of Appeal in **Muscutt**, and to also reconsider this Court's earlier decisions in **Oakley** ; **O'Brien**; and **Dennis, supra**, jurisprudence which counsel for the appellants characterized as "problematic".

[41] I recognize that the appellants find some support for their position in academia. See for example, Tanya J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada", 33 Queen's L.J. 179, 2007-2008.

[42] With respect I cannot accept the appellants' submissions.

[43] The simple answer to the appellants' complaint may be found in this Court's own jurisprudence. It seems to me, with respect, that the appellants are merely repeating the very same arguments that were advanced – unsuccessfully – in other cases before this Court. To illustrate I need only refer to the reasons of Justice Hallett in **O'Brien v. Canada (Attorney General)** which incidentally involved an appeal from a decision of Justice Wright, the judge in this case. To make my point I will quote from the reasons of Justice Hallett at some length:

> [5] The appellants assert that this Court in **Oakley v. Barry** (1998), 166 N.S.R. (2d) 282; (leave to appeal to Supreme Court of Canada refused by that Court on October 15th, 1998, [1998] S.C.C.A. No. 282), misinterpreted the Supreme Court of Canada decisions in **Morguard Investments Ltd. v. De Savoye**, [1990] 3 S.C.R. 1077; **Hunt v. T&N PLC,** [1993] 4 S.C.R. 289; and **Tolofson v. Jensen: Lucas (Litigation Guardian of) v. Gagnon**, [1994] 3 S.C.R. 1022 and that Justice Wright erred in following **Oakley**. Alternatively, the appellants argue that Justice Wright erred in his application of Oakley to the facts relevant to the respondent's claim.
>
> [6] I have considered: (I) the appellants' submissions, (ii) this Court's decision in **Oakley**, and (iii) the decisions of the Supreme Court of Canada in **Morguard**, **Hunt** and **Tolofson**. I have reviewed Justice Wright's decision.
>
> [7] Justice Wright found that the facts relevant to the respondent's claim were strikingly similar to the facts in **Oakley**. I agree. I disagree with the appellants' submission that there are significant factual differences between the two cases. In my opinion Justice Wright recognized what differences there were and he properly considered them.
>
> [8] Counsel for the appellants has essentially made the same arguments on this appeal that he made to this Court in **Oakley**. In para. 59 Pugsley, J.A., writing for the Court, summarized the appellant's submissions as follows:
>
> > [59] The appellants submit that the issue before the court in this case is a simple one, namely whether the respondent's residence in Nova Scotia when the action was commenced, and nothing more, is sufficient to ground jurisdiction in the courts of this province. In support of counsel's position our attention is directed to the following cases: **MacDonald v. Lasiner** (1994), 21 O.R. (3d) 177 (Ont. Gen. Div.); **Long v. Citi Club**, [1995] O.J. No. 1411,

(Ontario General Division, May, 1995 - Ottawa 82955/94); **LeRoy v. Jarjoura**, [1996] O.J. No. 5174, (Ontario General Division, February 1996 - File No. 87982/94); **Cook et al. v. Parcel, Mauro, Hultin & Spannstra, P.C.**, [1997] 5 W.W.R. 299; 87 B.C.A.C. 97; 143 W.A.C. 97 (C.A.)). The trial judges in each of the first three cases, concluded that the situs of the actions were not the convenient forum in which the cases should be tried. This is readily distinguishable from the present case where *forum non conveniens* has been determined against the appellants by Justice Davison.

[9] Justice Pugsley dealt with this argument at paras. 60 and 61:

> [60] I agree with Professor Blom, in his reference to the "open-endedness of the **Morguard** formula" (at p. 393) and his comment that in trying to determine the meaning of order and fairness, in a jurisdiction *simpliciter* case, it may be necessary to take into account factors normally considered in a *forum non-conveniens* case "in order to avoid injustice" (p. 387). I repeat what Justice La Forest said about the relationship between these considerations in **Hunt**, supra at 326:
>
> > ... the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.
>
> [61] The material in the present case demonstrates, in my opinion, that the respondent's connection with Nova Scotia is far more than mere residence. The affidavit deposed by Ms. Oakley is unchallenged. No request was made to cross-examine her before the Chambers judge.

[10] Justice Pugsley concluded his analysis of the questions before him with the following statement:

> [95] Nova Scotia was the situs where Nova Scotia physicians disclosed to the respondent that the diagnosis she originally received in New Brunswick was allegedly in error. The respondent continued, and still continues, to reside in Nova Scotia and to be treated by Nova Scotian physicians. There is a significant connection with Nova Scotia being the place where the respondent has suffered her damages.

> [96] The concept of fairness in determining jurisdiction should be considered from the point of view of both the respondent, as well as the appellants. While this issue, as well as the issue of juridical advantage, are matters that are usually considered on a *forum non-conveniens* issue, it is appropriate and relevant to consider them in this case involving jurisdiction *simpliciter*. The concept of fairness is overwhelmingly decided in favour of the respondent, whose deposition before the Chambers court remained unchallenged.

[11] Counsel for the appellants has made a strong argument that there is no real or substantial connection between the respondent's cause of action and Nova Scotia where he has commenced this proceeding. Counsel argues that the tort was completed in New Brunswick in that the duty of care owed by the respondent doctors was allegedly breached in New Brunswick and the damage suffered, that is the May 31st, 1999 stroke, occurred in New Brunswick.

[12] The appellants submit that the mere fact the respondent lives in Nova Scotia and, therefore, suffers in Nova Scotia from the alleged negligence of the appellants does not create a real and substantial connection between the subject-matter of the action and Nova Scotia. This argument accords with a line of lower court decisions in Ontario but does not reflect the opinion of this Court in **Oakley**. Counsel also submits that Justice LaForest never intended that judges when applying the real and substantial connection test, would consider whether it was fair to the parties that the forum court assume jurisdiction based, in part, on the personal circumstances of the parties as was done in **Oakley** and by Justice Wright. Counsel for the appellants seems to be saying that Justice LaForest meant only that the real and substantial connection test, developed in **Moran v. Pyle National (Canada) Ltd.**, [1975] 1 S.C.R. 393 and elaborated on by LaForest, J. in the three decisions referred to, was a test that <u>in itself</u> accommodated the judicial requirement of order and fairness in determining if jurisdiction should be assumed in a proceeding commenced against out of province defendants.

[13] The opposite interpretation was reached by Justice Pugsley in Oakley.

[14] In **Morguard**, after giving full consideration to all the authorities relevant to determining if a court should assume jurisdiction in a proceeding against an out of province defendant, LaForest, J. stated at p. 1108:

> ... It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords

> some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. ...

[15] Two years later, LaForest, J., writing for the Court in **Hunt, supra**, confirmed and expanded upon the views he expressed in **Morguard** where he stated in **Hunt** at p. 325:

> In *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a "real and substantial connection" to the forum that assumed jurisdiction and gave judgment. Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction. Indeed I observed (at p. 1104) that the "real and substantial connection" test was developed in *Indyka v. Indyka*, [1969] 1 A.C. 33, in a case involving matrimonial status (where sound policy demands generosity in recognition), and that in a personal action a nexus may need to be sought between the subject-matter and the territory where the action is brought. I then considered the test developed in *Moran v. Pyle National (Canada) Ltd., supra*, for products liability cases as an example of where jurisdiction would be properly assumed. The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. More than this was left to depend on the gradual accumulation of connections defined in accordance with the broad principles of order and fairness ...

[16] At p. 326 in **Hunt, supra**, LaForest, J. continued as follows:

> Since the matter has been the subject of considerable commentary, I should note parenthetically that I need not, for the purposes of this case, consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of *forum non conveniens*; see the opposing views of V. Black in the article just cited, and P. Finkle and C. Labrecque, "Low-Cost Legal Remedies and Market Efficiency: Looking Beyond Morguard" (1993), 22 *Can. Bus. L.J. 58*. Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by

> the requirements of order and fairness, not a mechanical counting of contacts or connections. ...
>
> [17] A reading of this passage supports the interpretation that LaForest, J. was of the view that whether a superior court is considering if it should assume jurisdiction in a proceeding in that court or in the exercise of its discretion to decline jurisdiction on the basis of *forum non conveniens*, the court is to be guided by the requirements of order and fairness. ...
>
> [20] This Court, in **Oakley**, in effect rejected the submission of counsel for the appellants that the concept of order and fairness does not apply when the Court is considering whether it should assume jurisdiction but only applies to the consideration of whether the Court ought to decline jurisdiction on the basis of *forum non conveniens*. Counsel for the appellants asserts that the statements of LaForest, J. which I quoted herein are obiter and that to interpret the passage as this Court has done in **Oakley** is to take the passages out of context. I disagree. The concept of order and fairness is integral to the question of determining whether there is a real and substantial connection between the cause of action and the forum province. This Court has held in **Oakley** that it is not inappropriate for a court to consider as a component of the test, the fairness to the parties in determining if there is a real and substantial connection between the cause of action and the forum province that warrants a finding that the court has jurisdiction *simpliciter*. (Underlining mine)
>
> [21] Considering the pronouncements by the Supreme Court respecting the underlying principles of order and fairness that guide a court in resolving the question whether to assume jurisdiction or not in a particular proceeding and considering the decision of this Court in **Oakley**, Justice Wright did not err in determining that the Supreme Court of Nova Scotia had jurisdiction to adjudicate the respondent's claim. Justice Wright properly considered the issue of fairness to the parties in deciding that there was a real and substantial connection between the cause of action and Nova Scotia as the respondent's damages, an essential element of the tort, are suffered in this Province where the respondent resides and where he has commenced his action.
>
> [22] Justice Wright was bound by the Oakley decision. He did not misinterpret Justice Pugsley's decision in Oakley. He properly applied the reasoning of that decision to the facts before him. It cannot be said that in doing so he erred in law. ...

[44] No good reason has been advanced which would cause me to depart from this Court’s longstanding approach in such matters. The example I have provided

in this lengthy extract provides a complete answer to the appellants' complaint. But I wish to add to those earlier commentaries.

[45] In **Muscutt** Justice Sharpe provided a most instructive history of the jurisprudential evolution in this area of the law. He tracked the leading decisions of the Supreme Court of Canada as well as other appellate authority and offered, in my respectful view, a correct analysis and summary of the current state of the common law. He noted Justice LaForest's call for fundamental change in **Morguard** based on the recognition that the courts' traditional pre-occupation with notions of sovereignty were out of step with the reality of modern commerce and mobility. The remarkable changes we have seen in the way people live and conduct business now require that the proper exercise of jurisdiction be based on two principles. First, the need for "order and fairness"; second, the requirement that there be a "real and substantial connection".

[46] Justice Sharpe recognized the important distinction between the real and substantial connection test, and the discretionary doctrine of *forum non conveniens*. I agree with his observation that:

> [43] ... While the real and substantial connection test is a legal rule, the *forum non conveniens* test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the *forum non conveniens* test is a discretionary test that focuses upon the particular facts of the parties and the case. The question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant. ...

[47] I would also concur with Justice Sharpe's observations in **Lemmex v. Bernard** (2002), 60 O.R. (3d) 54 at [28] where he said:

> [28] ... the real and substantial connection test is a flexible test that involves the exercise of considerable judgment in weighing the factors that bear on jurisdiction *simpliciter*. I also agree that some of the factors relevant to jurisdiction *simpliciter* are also relevant to *forum non conveniens*. However, I would distinguish jurisdiction *simpliciter* and *forum non conveniens* for the purposes of appellate review.

One deals with the *assumption* of jurisdiction. The other deals with a *discretion not to exercise* jurisdiction. A correctness standard of appellate review applies to the former. A deferential standard of review limited to palpable and overriding error applies to the latter.

[48] As explained by Sopinka, J. in **Amchem**, **supra** at p. 912:

> [20] ... Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. ...

I agree with Sharpe, J.A.'s statement that where more than one forum is capable of assuming jurisdiction, the most appropriate forum may be determined through the use of the *forum non conveniens* doctrine which enables a court to decline to exercise its jurisdiction on the ground that there is another forum better suited to hear the case.

[49] I would also endorse Justice Sharpe's view that the application of the real and substantial connection test only requires such a nexus, not proof of the most real and substantial connection:

> [44] ...The residual discretion to decline jurisdiction where the real and substantial connection test is met assumes that the forum in question is not the only one that has jurisdiction over the case. The real and substantial connection test requires only a real and substantial connection, not the most real and substantial connection. See also J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Markham: Butterworths, 2002) at p. 1.40. Further, the residual discretion to decline jurisdiction also suggests that the consideration of fairness and efficiency is not exhausted at the stage of assumed jurisdiction and that there is scope for considering these factors at the *forum non conveniens* stage. The residual discretion therefore provides both a significant control on assumed jurisdiction and a rationale for lowering the threshold required for the real and substantial connection test.

[50] The reasons of the Ontario Court of Appeal in **Muscutt** embrace the earlier approach taken by this Court in **Oakley**, and in **O'Brien**, cases described and approved by Sharpe, J.A. as "leading authorities". In those decisions this Court reasoned that fairness to both parties was an appropriate consideration when deciding the first step in the legal analysis framework, that being whether there was a real and substantial connection between the cause of action and the forum chosen

by the plaintiff. For example, and I now repeat, in **O'Brien v. Canada (Attorney General)**, 2002 NSCA 21, Hallett, J.A. held at para. 20:

> [20] ... The concept of order and fairness is integral to the question of determining whether there is a real and substantial connection between the cause of action and the forum province. This Court has held in **Oakley** that it is not inappropriate for a court to consider as a component of the test, the fairness to the parties in determining if there is a real and substantial connection between the cause of action and the forum province that warrants a finding that the court has jurisdiction *simpliciter*.
> (Underlining mine)

[51] Accordingly, I reject the suggestion that considerations of fairness have no place in the inquiry into the existence of a real and substantial connection, and are only to be weighed during the application of the discretionary *forum non conveniens* doctrine. In my respectful view, such a prohibition would introduce an unnecessary and unrealistic rigidity to a test that is clearly designed to be flexible. To impose such a constraint would prevent a judge's assessment of the totality of the evidence when deciding whether the circumstances made it proper to accept jurisdiction over the action as framed by the plaintiff.

[52] From the cases he reviewed, Justice Sharpe identified a list of emerging factors which would be relevant in assessing these jurisdictional questions. Sharpe, J.A. offered a list of eight factors:

(1) The connection between the forum and the plaintiff's claim

(2) The connection between the forum and the defendant

(3) Unfairness to the defendant in assuming jurisdiction

(4) Unfairness to the plaintiff in not assuming jurisdiction

(5) The involvement of other parties to the suit

(6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

(7) Whether the case is interprovincial or international in nature

> (8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[53] These were the same eight factors considered by Justice Wright in satisfying himself that Nova Scotia had acquired a real and substantial connection to the present litigation. I would endorse this list as a useful series of criteria with which to judge such matters, while at the same time observing that the list is by no means exhaustive. It offers a roadmap to guide judges hearing such applications. To borrow the language of s. 11 of the **Act**, the list of factors serves to complement "[w]ithout limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection ...". I would conclude on this point by endorsing the observations of Justice Sharpe in introducing the factors he identified:

> [75] It is apparent from *Morguard*, *Hunt* and subsequent case law that it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.
>
> [76] But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative. Rather, all relevant factors should be considered and weighed together. ...

[54] Justice Wright carefully considered all of these factors and explained his reasons for assigning the weight he ascribed to each one. After completing that exercise he concluded that this was the type of case where more than one forum was capable of legitimately assuming jurisdiction. In my opinion the Chambers judge did not err in his interpretation and application of the **Act** when he found that there was a real and substantial connection between this province and the facts on which Ms. Penny's litigation is based, and that therefore the Nova Scotia Supreme Court had territorial competence.

[55] I will now consider the second of my three questions.

(2) Did the Chambers judge err in failing to determine that the Court of Queen's Bench of Alberta was a more appropriate forum?

[56] The prospect that there may well be instances where more than one forum is capable of acquiring territorial competence was recognized by the Supreme Court in **Amchem**, see para. [48] of my reasons, **supra**.

[57] This is precisely what Justice Wright determined in this case. He found that there were legitimate reasons to ground a real and substantial connection to both Nova Scotia and Alberta. I have already explained in considerable detail how he made no error in reaching such a conclusion.

[58] The question then became an exercise of deciding whether Nova Scotia *should* claim jurisdiction or waive it in favour of Alberta. This called for the exercise of discretion, focussing upon the particular facts surrounding the parties and this case. In undertaking this inquiry Wright, J. was obliged to consider and apply s. 12 of the **Act**. Section 12 of our **Act** is an exact duplicate of s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, of British Columbia, S.B.C. 2003, c. 28 (C.J.P.T.A.). In the very recent decision of the Supreme Court of Canada in **Teck Cominco Metals Ltd. v. Lloyd's Underwriters**, 2009 SCC 11, Chief Justice McLachlin explained the effect of this legislation. She said at para. 21:

> 21 ... The CJPTA creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*). It requires that in every case, including cases where a foreign judge has asserted jurisdiction in parallel proceedings, all the relevant factors listed in s. 11 be considered in order to determine if a stay of proceedings is warranted. This includes the desirability of avoiding multiplicity of legal proceedings. But the prior assertion of jurisdiction by a foreign court does not oust the s. 11 inquiry.
>
> 22 Section 11 of the CJPTA was intended to codify the *forum non conveniens* test, not to supplement it. The CJPTA is the product of the Uniform Law Conference of Canada. ... It admits of no exceptions.

[59] The Chief Justice provided further elaboration on the approach that ought to be taken by judges facing applications to dismiss or stay proceedings under the

statute. She observed that the hearing judge in that case had carefully considered all of the factors, and arguments and "the totality of the evidence". She said:

> 30 ... [A] holistic approach, in which the avoidance of a multiplicity of proceedings is one factor among others to be considered, better serves the purpose of fair resolution of the *forum non conveniens* issue with due comity to foreign courts.

[60] Here I am satisfied that Wright, J. undertook the type of comprehensive, holistic inquiry described by the Chief Justice. He carefully considered each of the competing factors advanced by the parties. He did not overlook or misapprehend any of the circumstances before him. His conclusions were not prompted by palpable and overriding error. He neither erred in principle nor produced a result leading to a patent injustice.

[61] While the language of s. 12(1) provides that a hearing judge may decline to exercise territorial competence on the ground that another jurisdiction "is a more appropriate forum" I am not persuaded Justice Wright erred when he applied the language "clearly more appropriate" as directed by the Supreme Court of Canada in **Amchem**, or followed by this Court in subsequent decisions, **Dennis** being an example. To my mind Wright, J. did not impose an unfair or improper burden of persuasion upon the appellants.

[62] As Justice Sopinka made clear in **Amchem**, the existence of a more appropriate forum must be clearly established in order to displace the forum selected by the plaintiff. Where there is no one forum that is the most appropriate, the domestic forum chosen by the plaintiff wins out by default. Justice Wright was bound by the Supreme Court's ruling in **Amchem**. Nothing in the **Act** changes the test to be applied in such circumstances. Accordingly, I would not disturb Justice Wright's conclusion:

> [73] .... factors which favour trial in Nova Scotia, show that there is no one jurisdiction which is clearly more appropriate than the other for the trial of this action.
>
> [74] Since the selected forum wins out by default in that situation, according to Amchem, the defendants' application must fail, thereby enabling the plaintiffs to proceed with their action in this Court.

(3) Did the Chambers judge err in failing to consider the first two questions as of either the time of Caiden's birth, or the date this suit was commenced, and by taking into account factors which arose only *after* Ms. Penny started her law suit, and the hospital applied to have it dismissed?

[63] Here it will be recalled that in the appellants' view, the Chambers judge erred by taking into account facts that were only disclosed at the time of the hearing when – they say – he should have restricted himself to an assessment made as at either January 1, 2008 (when the law suit was commenced) or July 17, 2004 (when Caiden was born).

[64] I do not accept the appellants' submission.

[65] The **Act** itself neither explicitly, nor by implication, restricts the hearing judge to a particular moment in time, beyond which the evaluation would be invalid. In my opinion, such a rigid limitation would defeat the flexible, holistic approach urged by the Supreme Court of Canada when describing legal principles which the Court acknowledges have not yet been fully shaped and defined. Obviously the rigidity urged by the appellants would constrain the hearing judge in applying the **Act** to the totality of the evidence presented. I would not ascribe to such a view.

[66] As we have seen, s. 4 lists the five circumstances in which territorial competence will be established. As I have already explained, none of subsections 4(a) through (d) apply. The solitary reference to the "commencement of the proceeding" is found in ss. 4(d) which reads:

> That person is ordinarily resident in the Province at the time of the commencement of the proceeding; or

[67] Only ss. 4(e) has any application to this case. The words "at the time of the commencement of the proceeding" do not appear in ss. 4(e). Had the Legislature intended such a temporal restriction, it would have been very easy to include such a phrase. The omission lends further support to my conclusion that in conducting the real and substantial connection inquiry the judge is not tied to the moment the proceeding was commenced.

[68] In this case, Wright, J. acknowledged that the plaintiff, Ms. Penny, would have failed in her efforts to have Nova Scotia take on territorial competence had the facts been limited to June 12, 2008 when the appellant hospital filed its application to dismiss or stay the law suit. Justice Wright said:

> [33] Before examining the eight factors identified in **Muscutt** to be considered, I interject that had this application been heard as matters stood when it was filed, the plaintiff would have been unable to meet the real and substantial connection test. However, a number of factual developments have occurred since that time, as recited earlier in this decision, and they must now be taken into account in the consideration and weighing of the various factors identified in **Muscutt**. My consideration of each of these factors in this case follows.

[69] The new "factual developments" to which Justice Wright referred are contained in the affidavit Ms. Penny swore July 17, 2008, as her response to the hospital's application, and in her answers during cross-examination at the Chambers hearing. Among other things, those developments included details concerning the extensive treatment Caiden had received and will continue to receive in Halifax; the fact that her lawyers are acting on a contingency basis; special challenges surrounding her virtual impecuniosity; the support from her family upon which she is so dependant; the fact that she would be incapable of proceeding with this law suit in any other place than Nova Scotia; the likelihood that Caiden would not be physically capable of travelling to Alberta if the case were moved there; the long list of health care professionals who reside in Nova Scotia and who will be called to testify in his case on a variety of issues including liability, causation and damages; her stated intention that she will spend her future in Nova Scotia; and her vigorous denial of the suggestion made by counsel for the appellants that she only chose to return to Nova Scotia when questions arose concerning jurisdiction.

[70] In my view these were all matters properly before Justice Wright. They are strikingly similar to the circumstances recognized by the Court as being highly significant in **Dennis**. There, Flinn, J.A. canvassed in considerable detail the facts deposed to in competing affidavits, which were said to link that case (with marked similarities to this one) to either Nova Scotia or Newfoundland and Labrador. There was no suggestion in **Dennis** that the hearing judge or this Court were in any way limited in their review of the facts, to some sort of inflexible moment in time

which preceded the date of the Chambers hearing. On the contrary, all facts, properly admitted, were relevant.

[71] Had the Legislature intended to impose such a temporal leash upon judges it could easily have said so. There is no part of the **Act** which explicitly or by implication suggests to me any such limitation. In my opinion, the reviewing judge is free to examine all of the facts as they exist at the time of the hearing in order that the question of jurisdiction may be decided on the totality of the evidence having regard to the analytical framework set forth in the statute.

[72] I do not share the appellants' concern that determining jurisdiction at the time of the hearing will provoke eleventh hour filings of competing affidavits designed to bolster, or defeat claims of jurisdictional connection, or mean that jurisdiction simply "comes and goes" such that it becomes so elastic as to be virtually meaningless. Bringing forward evidence by way of affidavit is standard procedure. Reference need only be made to this Court's decision in **Dennis** to understand the importance placed on the facts deposed to by the parties at such a hearing. That is to be expected. But affidavits must comply with the **Rules** and the hearing judge assuming the customary role as gatekeeper will be expected to decide their relevance and admissibility. Recalling the language of (then) Justice McLachlin in **Avenue Properties Ltd. v. First City Development Corporation Ltd. et al** (1986), 7 B.C.L.R. (2d) 45 **infra**, [74], the hearing judge will always be required to decide the *bona fides* of the purported connection. Touted jurisdictional links which are shown to be bogus, suspect or trivial will not pass muster. They will not qualify as *real* and *substantial*.

[73] This does not "create jurisdiction retroactively" but simply reflects the fact that the test is a flexible one which calls for the weighing of a variety of factors based on the totality of the evidence presented. Obviously, residence at the time of pleading will be a consideration. So too – in this case – will be the place of birth. At the hearing Mr. Wagner, counsel for the respondents, took some exception to Justice Wright's finding that "the alleged tort was completed in that jurisdiction" (i.e., Alberta). See for example, paras. 34 and 67 of Wright, J.'s decision. However, the respondents did not file a cross-appeal or notice of contention in these proceedings. I will therefore assume, without deciding, that the "alleged tort" was finalized in Alberta. That finding has no bearing on the merits of this appeal. I do add parenthetically the observation that it was Dickson, J. (as he then

was) in **Moran v. Pyle National (Canada) Ltd.**, [1975] 1 S.C.R. 393 who chose to adopt the "real and substantial connection" test in a tort case, and then went to considerable lengths to explain that fixing the "location" of a tort was often a matter of some difficulty.

[74] The position urged by the appellants also ignores the importance always attached to the plaintiff's choice of forum. In **Dennis, supra**, Flinn, J.A. put it nicely when he said:

> **[15]** ... There is good reason why, in order to displace an appropriate forum selected by the plaintiff, a more appropriate forum must be clearly established. I cannot express that reason any better than did McLachlin, J.A. (as she then was) in the case of **Avenue Properties Ltd. v. First City Development Corporation Ltd. et al** (1986), 7 B.C.L.R. (2d) 45 at p. 50:
>
> > "...a plaintiff's choice of forum should not be lightly denied. It is his right to have ready access to the courts of his jurisdiction and not to be required to travel outside his jurisdiction to present his case. This is particularly the case where the plaintiff resides in the jurisdiction where he seeks to bring his action or where there is some other bona fide connection between the action and the jurisdiction in which it is sought to be brought. Accordingly, the court's jurisdiction to stay proceedings should be used sparingly."
>
> (underlining mine)

[75] I think it also useful to recall that in **Teck Cominco** Chief Justice McLachlin commended the approach taken by the Chambers judge in carefully analyzing the factors and the arguments against the totality of the evidence before him. The Chief Justice listed among the factors taken into account by the judge in reviewing the convenience and expense of the parties and potential witnesses, "the fact the overall cost of litigation would be greater if the coverage action proceeded in Washington State". I imagine that that fact and details surrounding it could only have been produced at the time the Chambers judge conducted the hearing. Clearly those "facts" would not have been known either when the cause of action for environmental damage had accrued nor presumably when the suit was commenced.

[76] By the time the parties appeared before Justice Wright in Chambers, Ms. Penny and her two children were residing in Nova Scotia. She chose to bring her

action here. Those were significant, relevant factors which the Chambers judge was required to take into account. Then – in the words of McLachlin, J.A. (as she then was) – he could also look to see if there was "some other *bona fide* connection between the action and the jurisdiction in which it is sought to be brought." I am satisfied Justice Wright conducted a thorough and proper evaluation of the evidence before him in the exercise of his discretion. There is nothing here which would cause me to intervene.

[77] Before concluding my reasons I would observe that there is a difference but a natural overlap between unfairness, and inconvenience. While a party may be inconvenienced by the choice of forum, it may not constitute significant unfairness to that particular litigant. See for example **Lemmex, supra** at para. [37]. Inconvenience typically reflects concerns such as increased, unnecessary expense; time tabling difficulties; disruption to other obligations owed by parties and witnesses, and the like. Unfairness is a broader concept which I take to include notions of equity, the interests of the parties involved in the subject litigation as well as litigants in similar circumstances generally; and issues of fairness and comity within the legal system as a whole. Justice Wright's reasons demonstrate his appreciation of the difference.

Conclusion

[78] The **Court Jurisdiction and Proceedings Transfer Act**, S.N.S. 2003, c. 2 does not change the common law but simply codifies this country's jurisdictional rules in accordance with the principles laid down by the Supreme Court of Canada as well as this and other appellate courts. Justice Wright applied the correct legal test in interpreting and applying the **Act** when deciding territorial competence. His reasons and analysis do not reflect any palpable and overriding error. His decision does not disclose an error in principle nor lead to a patent injustice.

[79] I would dismiss the appeal with costs of $2,500.00 inclusive of disbursements payable by <u>each</u> of the appellants.

Saunders, J.A.

Concurred in:

Roscoe, J.A.

Oland, J.A.