NOVA SCOTIA COURT OF APPEAL

Citation: *IBC Advanced Technologies, Inc. v. Ucore Rare Metals Inc.*, 2019 NSCA 80

Date: 20191009
Docket: CA 487418
Registry: Halifax

Between:

IBC Advanced Technologies, Inc., a body corporate, and Steven R. Izatt

Appellants

v.

Ucore Rare Metals Inc., a body corporate

Respondent

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	June 19, 2019, in Halifax, Nova Scotia
Subject:	***Courts Jurisdiction and Proceedings Transfer Act,*** S.N.S. 2003, c. 2 **(*CJPTA*). s. 2(h), 3(2), 4, 11 and 12; Attornment to the Jurisdiction; Real and Substantial Connection to Jurisdiction; *Forum non conveniens.***
Summary:	The appellants sought to stay the respondent's amended Action commenced in Nova Scotia on the basis that Utah, the appellants' home state, was a more convenient forum. The motions judge found that the appellants had attorned to the jurisdiction of Nova Scotia and had lost any ability to argue that Nova Scotia was a *forum non conveniens*. In the alternative, the motions judge found, that based on the *CJPTA*, that there was a real and substantial connection between the facts of the case and Nova Scotia. He also determined that Nova Scotia was an appropriate forum and dismissed the appellants' motion.

Issues:

(1) Should leave to appeal be granted?
(2) Did the motion judge err:
(i) in finding that the appellants had attorned to the jurisdiction of Nova Scotia;
(ii) in failing to conduct the necessary analysis with respect to jurisdiction under s. 11(1) of the *CJPTA*;
(iii) in concluding that attornment operates as a bar to alleging Nova Scotia is a *forum non conveniens*;
(iv) in finding Nova Scotia was the most convenient forum for determination of the claim.

Result:

Leave to appeal allowed. Appeal dismissed. The motions judge did not err in finding that the appellants had submitted to the jurisdiction of the Nova Scotia Courts.

However, he did err in finding that once the appellants submitted to the territorial competence of Nova Scotia, they lost their ability to argue *forum non conveniens*. The *CJPTA* is a complete code to the determination of territorial competence and *forum non conveniens*. It makes no distinction between territorial competence found on the basis of submission or attornment to the jurisdiction and any other basis for territorial competence – such as a real and substantial connection.

With respect to his alternative finding, he did not err in finding that there was a real and substantial connection to Nova Scotia.

In conducting his *forum non conveniens* analysis after concluding that Nova Scotia had territorial competence based on a real and substantial connection, the trial judge erred in failing to take into consideration all of the factors mandated by s. 12 of the *CJPTA*.

In particular, he failed to consider the law to be applied to the issues in the proceeding and whether any eventual judgment could be enforced. Despite these errors, a review of the record established that those two factors would not have had any impact on the eventual outcome. Therefore, although the

motions judge erred, the error did not affect the outcome.

The appeal was dismissed with costs to the respondent in the amount of $2,000 inclusive of disbursements.

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Respondent

Judges:	Beveridge, Fichaud and Farrar, JJ.A.
Appeal Heard:	June 19, 2019, in Halifax, Nova Scotia
Counsel:	Michelle C. Awad, Q.C. and Robert Mroz, for the appellants Caitlin Regan and Stewart F. Hayne, for the respondent

Reasons for judgment:

[1] The appellant, IBC Advanced Technologies, Inc., manufactures products and develops processes incorporating minerals separation technology. Its technology has been used for separating a category of minerals called "rare earth elements" from raw materials.

[2] On March 14, 2015, Ucore Rare Metals Inc. and IBC entered into an agreement which granted Ucore an option to purchase IBC and its underlying technology (the Option Agreement).

[3] On March 13, 2017, Ucore issued a Press Release advising the public of the existence of the Option Agreement.

[4] On November 26, 2018, IBC issued its own Press Release stating that the Option Agreement had been mutually terminated and that Ucore had no right to purchase IBC.

[5] IBC's Press Release set off a cascade of proceedings, the first being a Notice of Application in Court filed in Nova Scotia by Ucore against IBC and Steven R. Izatt, the President and CEO of IBC[1]. The Notice of Application was amended by Order dated April 1, 2019.

[6] IBC made a motion to dismiss or permanently stay Ucore's amended claim on the basis that Nova Scotia did not have jurisdiction, or alternatively, it was a *forum non conveniens*.

[7] The motion was heard before Justice James L. Chipman on April 23, 2019. By oral decision dated that day and a written decision released April 26, 2019 (reported as 2019 NSSC 132), he dismissed the motion. The Motions Judge found that IBC had attorned to the jurisdiction of the Nova Scotia Courts and had lost its ability to argue that Nova Scotia was a *forum non conveniens*.

[8] In the alternative, he found, based on the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2 *(CJPJA*), that there was a real and substantial connection between the facts of this case and Nova Scotia. This Province was an appropriate forum.

[1] I will refer to IBC and Mr. Izatt collectively as IBC unless the context requires otherwise.

[9] IBC appeals and Ucore has filed a Notice of Contention. The Notice of Contention simply asks that Chipman, J.'s alternative finding be upheld. That issue is before us as a result of the Notice of Appeal filed by IBC and it is not necessary to consider it separately under the Notice of Contention.

[10] For the reasons that follow I would grant leave to appeal, dismiss the appeal with costs to the respondent in the amount of $2,000 inclusive of disbursements.

Background

[11] On December 11, 2018, Ucore filed a Notice of Application in Court which pleaded:

(a) IBC defamed Ucore by stating that it was IBC's firm position that Ucore does not have any right to exercise [an option to purchase IBC] because, among other reasons, the parties had agreed to terminate the Option Agreement;

(b) IBC committed the tort of injurious falsehood against Ucore by making the above statement with "malicious intent to cause Ucore economic harm and/or loss, without lawful excuse. IBC knew that the November 26, 2018 Press Release was untrue or was reckless as to its truth. IBC also knew and intentionally exploited the fact that Ucore relies upon external financing principally by selling Ucore's shares to investors"; and

(c) As a result of the above, IBC lawfully interfered with Ucore's economic relations.

[12] On January 4, 2019, IBC filed a lawsuit against Ucore in Utah (the First Utah Complaint). The First Utah Complaint alleged seven causes of action including misappropriation of trade secrets, trademark infringement, unfair competition, defamation, false light, tortious interference with economic relations and unjust enrichment.

[13] On January 15, 2019, IBC appeared through its counsel, Matthew Moir, before Justice Ann Smith on Ucore's Motion for Directions in the Notice of Application proceeding. The parties agreed to February 5, 2019 as the deadline for IBC to file its Notice of Contest and any claim by the respondent. Ucore was to file its Notice of Contest to IBC's claim, if any, by February 19, 2019. On January 31, 2019, Justice Smith issued an order incorporating these deadlines.

[14] On February 1, 2019, Mr. Moir wrote to Ucore's counsel requesting an extension of time to file the Notice of Contest. That correspondence explains IBC's reasoning for requesting the extension:

> …I still have a fair amount more to go through before I will be ready to draft my notice of contest. As well, in order to make a decision whether or not to bring a counterclaim in this proceeding, and the drafting of such a counterclaim, requires, in addition to a fulsome review of the factual matrix, an analysis of a lengthy and complex claim filed in the State of Utah, which requires consultation with Utah counsel concerning Utah and US law. As you know, your client claims significant relief in this proceeding, warranting a higher degree of care in drafting pleadings. Communications with my client and Utah counsel are hampered somewhat across time zones.
>
> … Rather than risk wasting time committing to two more weeks now and having to revisit this issue later to consider a third, I am going to suggest we agree to a further three weeks now, but I undertake to make best efforts to file earlier than this if possible – that is, until February 26, 2019 at the latest.
>
> If your client is prepared to agree to this extension without a formal motion, then I would prepare an order and petition Smith J. to issue, subject to your prior review.
> …
>
> [Emphasis added]

[15] The discussion regarding an extension continued between February 1 and February 7, 2019 resulting in Ucore agreeing to extend IBC's deadline to file its Notice of Contest and respondents' claim to February 22, 2019.

[16] Justice Smith issued a Consent Order on February 14, 2019, incorporating the new deadlines, which required the respondents to file their Notice of Contest and Claims by February 22, 2019 and that Ucore would file its Notice of Contest no later than March 1, 2019.

[17] On February 12, 2019, Ucore's counsel requested that Mr. Moir, on behalf of IBC, provide an outline of its intended respondent's claim.

[18] Mr. Moir responded that same day saying:

> There will be claims in the Notice of Respondents' Claim [which] are significantly expanded from the Utah pleading. I am not yet ready, however, to provide you with an outline but I will provide one as soon as I can. I assure you that my client and I have been working on this case nearly every day going back to January.

[19] In the meantime, on February 14, 2019, Ucore sought to trigger its right under the Option Agreement by issuing a Notice of Commencement, as that term was defined in the Agreement. The Notice of Commencement was required to initiate the purchase process as set out in the Option Agreement.

[20] On February 19, 2019, IBC purported to terminate the Option Agreement and filed a second lawsuit in Utah (the Second Utah Complaint).

[21] On February 22, 2019, IBC's counsel corresponded with the Court to address issues that were going to arise on the Motion for Directions, which was scheduled for March 4, 2019 at 11:00 a.m. That correspondence includes the following representations on behalf of IBC:

> It quickly became clear that my client's case would include a counterclaim and set-off, which I would not have time to digest, draft and have ready for filing in time for February 5. The parties agreed to an extension to today, which formed the subject-matter of another order of her ladyship's.
>
> The applicant's claim is for alleged damages arising from a certain press release issued by my client, stating that a certain option agreement signed between the parties was no longer enforceable by Ucore, such as to permit Ucore to purchase IBC unilaterally. That press release was one of a number of press releases made by both parties involving the option agreement. IBC will claim that Ucore was in violation by issuing its own press releases, which we will say were false.
>
> …
>
> The events concerning which both parties seek relief in this proceeding are unfolding. I anticipate that these events will shape my client's pleadings, and may also lead to amendments to the applicant's pleadings.
>
> …
>
> Mr. Izatt is shortly leaving his office for two weeks to travel on business, returning March 11. I canvassed the possibility of completing our pleadings together while he is away *via* email and this is not a possibility due to his intense schedule during this time, and his not having access to his office. It would not be possible to have our pleadings filed prior to March 18.
>
> We are also still in the process of identifying the disclosure in this proceeding. I am advised that we expect to require many months to prepare it.
>
> …
>
> Given the foregoing, it should not be surprising that I have received instructions to bring a motion pursuant to Rule 6, to convert this proceeding from an application to an action. The proceeding will take years not months, the witnesses are not identifiable and it is impossible to predict how long the hearing will require. I point out that Rule 6.03(1)(c) requires the affidavit in support of such a motion to include the issues in the anticipated statement of defence. I therefore

> do not expect to file our pleadings until after the motion to convert has been heard and decided.
>
> [Emphasis added]

[22] On February 25, 2019, Ucore's counsel wrote to the Court seeking an emergency interim injunction against IBC. In particular, Ucore was seeking an interim injunction restraining IBC from further compromising Ucore's rights to acquire IBC under the Option Agreement.

[23] On February 26, 2019, Mr. Moir wrote to the Court acknowledging that he had received Ucore's letter of February 25, 2019 and indicated he had cleared his schedule and would be ready to respond to the motion which was scheduled to be heard on Wednesday, February 27, 2019 at 2 p.m.

[24] On February 27, 2019, IBC's counsel again wrote to the Court advising it that the parties had been attempting to resolve the issues relating to the interim injunction. He provided the Court with a proposed form of order.

[25] Also, on February 27, 2019, the parties appeared before Justice Scott Norton to determine the form of the consent order and set the hearing of Ucore's interlocutory injunction for March 20, 2019. Justice Norton issued the Interim Injunction Order with the consent of IBC.

[26] On the same day, Ucore brought a motion in Utah to dismiss the First Utah Complaint for lack of jurisdiction[2].

[27] On March 4, 2019, IBC issued another press release in Utah. The press release puts an interesting spin on the proceedings in Nova Scotia; it suggests, without saying explicitly, that it was IBC who sought and was successful in obtaining an injunction against Ucore, when it was Ucore who sought an interim injunction enjoining IBC from further compromising Ucore's rights under the Option. IBC consented to the injunction. In the press release, IBC said:

> Advanced Technologies, Inc. ("IBC") is pleased to announce that Ucore Rare Metals, Inc. ("Ucore") has agreed to be enjoined from enforcing its asserted and disputed rights under the letter agreement, dated March 14, 2015, between Ucore

[2] The parties advised the Court that the First Utah Complaint has been dismissed by the Utah court. IBC says it was dismissed without Prejudice. The dismissal of the proceeding in Utah, on whatever terms, is of no significance to this appeal.

> and IBC, entitled "Option to Purchase IBC", … by the Supreme Court of Nova Scotia …

[28] In the same press release, IBC set out its intentions with respect to the Nova Scotia action:

> In addition, regarding the proceeding in Halifax, IBC has alerted the Court that it will file a motion to convert the proceeding from an application to an action, due to the substantial and complex claims IBC anticipates pleading in that matter. A key difference between an application and an action is that the latter, due to its complexity and magnitude, is expected to take years, not months, to resolve.

[29] On March 5, 2019, IBC sought to file a motion by correspondence seeking an interim sealing order in respect of the Option Agreement and other documents.

[30] On March 6, 2019, Ucore filed a brief contesting IBC's right to a sealing order.

[31] On March 6, 2019, IBC's counsel responded to the sealing order submissions made on behalf of Ucore. It disputed Ucore's assertion that the confidentiality provisions in the Option Agreement had expired, but stated that would be a matter that he "hope[d] to ask the court to consider on the evidence when [he was] able to file a full motion in Chambers".

[32] On March 6, 2019, Ucore filed its motion materials for the interlocutory injunction scheduled for March 20. It also sought to amend its pleadings to include additional claims in response to IBC's purported termination of the Option Agreement. The materials included a full and complete copy of the amended claims and were provided to IBC's counsel at that time.

[33] On March 11, 2019, IBC's counsel again wrote to the Court regarding its correspondence of March 5, 2019, wherein it sought a form of temporary sealing order. In that correspondence Mr. Moir advised the Court that the motion was more complex than he had anticipated:

> We have since learned that Ucore opposes the sealing order. As well the motion is more complex than I had anticipated. For these reasons, the motion is not appropriate for general chambers. It also occurred to me that the status of the sealing order one way or another would not encumber the proceedings scheduled for March 20. As well, although I have prepared a motion since March 5 and it can be ready to file today, we have [been simultaneously] engaged with Ucore's interlocutory injunction motion, which was filed on March 7, and in which our response is due March 13. The sealing order motion as prepared now is less

> complete than I would like it to be and my having more time to prepare the evidence and argument would be of benefit to the court.
>
> Therefore, we have scheduled the motion to be heard in special time chambers on June 12, 2019 at 2:00 pm, which is the soonest date for a half day in chambers for which counsel could be available. …
>
> The confidentiality of these materials is of very significant importance to IBC. IBC should have a fair opportunity to seek a permanent sealing order formally. …

[34] On March 13, 2019, Mr. Moir again wrote to the Court advising the Court and Ucore's counsel that IBC would not oppose the interlocutory injunction nor Ucore's motion to amend its pleadings:

> *Interlocutory Injunction*
>
> The respondents will not be opposing the interlocutory injunction. However, the respondents in no way speak, and have no authority to speak, on behalf of the other signatories to the Option Agreement, who have not been made parties to this proceeding.
>
> *Amended Pleadings*
>
> The respondents have not yet filed a notice of contest in this proceeding. (They were in the process of preparing a filing when it became clear that a motion to convert the proceeding to an action was warranted, following which the events leading to this motion overtook their attention.) The respondents who are presently named will not oppose the amendment.
>
> [Emphasis added]

[35] On March 12, 2019, IBC filed its motion for:

1. an order sealing the court record; or,
2. alternatively, an order sealing and/or redacting portions of court record.

[36] The motion was returnable on June 12, 2019 at 2:00 p.m.

[37] On March 14, 2019, IBC filed its materials in support of the sealing orders. These included an affidavit of Mr. Izatt, two affidavits of IBC's counsel's legal assistant, a brief, a book of authorities, and a draft order providing the relief sought by IBC. That same day, IBC also filed its responding materials in Utah, opposing Ucore's motion to dismiss the First Utah Complaint for want of jurisdiction.

[38] On March 18, 2019, the parties attended a teleconference with Justice Joshua Arnold who was scheduled to hear the March 20, 2019 interlocutory injunction. Mr. Moir attended on the call solely to advise that: his retainer for IBC had been

concluded; IBC was retracting its previous position and would contest the interlocutory injunction; and it was seeking an adjournment.

[39] In a letter dated March 18 (received March 19), Mr. Izatt, on his own behalf, wrote to the Court to confirm that IBC was requesting an adjournment of the interlocutory injunction to "a date which is convenient for the Defendants' new Counsel and for the Plaintiff and its Counsel".

[40] On March 20, 2019, IBC's proposed counsel attended to request an adjournment of the interlocutory injunction. Justice Arnold granted a brief adjournment.

[41] On March 22, 2019, Justice Arnold granted a temporary sealing order to May 3, 2019, by letter to Ucore's counsel and IBC's counsel in both Utah and Nova Scotia.

[42] On March 25, 2019, the parties rescheduled the interlocutory injunction for April 3, 2019 and set the permanent sealing order motion for April 4, 2019. IBC took no position on Ucore's request to amend its Notice of Application in Court, "without prejudice" to any future motion contesting jurisdiction. This was the first time IBC had raised the spectre of questioning the jurisdiction of the Nova Scotia Courts.

[43] On March 25, 2019, Justice Arnold granted Ucore leave to amend its Notice of Application in Court (the Amended Claims). The Order was issued on April 1, 2019.

[44] On March 28, 2019, IBC abandoned its permanent sealing order motion. In a letter to the judge scheduled to hear the motion for directions on April 1st, Ms. Michelle Awad, Q.C., now retained on behalf of IBC, wrote:

> The Respondents have not and do not intend to attorn to the jurisdiction of the Nova Scotia Courts in relation to the new claims raised in the Applicant's Amended Notice of Application in Court. The substance of this letter relates to procedural matters only and nothing in it should be taken as attornment by the Respondents.

[45] Ms. Awad did not raise any issue with the original Notice of Application and Nova Scotia's jurisdiction over it.

[46] The parties appeared at the Motion for Directions on April 1, 2019. The presiding judge, Justice Darlene Jamieson:

1. denied IBC's request to extend the temporary sealing order;
2. scheduled the jurisdiction motion for April 23, 2019; and
3. granted Ucore's request to convert the proceedings to an action and refer the matter to case management.

[47] On April 8, 2019, IBC filed its materials challenging the jurisdiction of Nova Scotia over the Amended Claims. Again, IBC confirmed that it did not contest Nova Scotia's jurisdiction over the original claims.

[48] The motion was heard as scheduled on April 23, 2019. As noted earlier, Justice Chipman denied IBC's motion with costs to Ucore in the amount of $2,000.00. IBC and Mr. Izatt now appeal.

Issues

[49] The appellants' Notice of Appeal and factum raise the following issues:

1. Should leave to appeal be granted to the Appellants?
2. Did the Motions Judge err in law in finding that the Appellants had attorned to the jurisdiction of the Nova Scotia Courts in relation to the Amended Claims?
3. Did the Motions Judge err in failing to conduct the necessary analysis with respect to jurisdiction under Section 11 of the *CJPTA* in relation to the Amended Claims?
4. Did the Motions judge err in law in concluding that attornment operates as a bar to alleging that Nova Scotia is *forum non conveniens*?
5. Did the Motions Judge err in finding that Nova Scotia is the most convenient forum for determination of the Amended Claims?

[50] I will set out the standard of review when addressing the individual grounds of appeal.

Analysis

Issue #1 Should leave to appeal be granted to the Appellants?

[51] The respondent acknowledges that the appellants have raised arguable issues on the appeal and that leave to appeal should be granted. I agree. It is not necessary to address it further. Leave to appeal is granted.

Issue #2 Did the Motions Judge err in law in finding that the Appellants had attorned to the jurisdiction of the Nova Scotia Courts in relation to the Amended Claims?

Standard of Review

[52] Whether the appellants have submitted to the jurisdiction of the Nova Scotia Courts is a question of mixed law and fact. The standard of review is that of a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, ¶36).

Analysis

[53] The *CJPTA* defines "proceedings" as follows:

> 2. In this Act,
>
> …
>
> (c) "proceeding" means an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion;
>
> …

[54] Rule 6 of the *Civil Procedure Rules* allows a party to start a proceeding by way of an Action or an Application:

> **Choice of proceeding**
>
> **6.01** A person may choose to start an action or an application as the person is satisfied would be appropriate, unless legislation under which the proceeding is started requires only one kind of proceeding.

[55] Rule 6.02 of the *Civil Procedure Rules* gives a judge the discretion to convert an Application to an Action or an Action to an Application.

[56] In this case, Ucore chose to commence the proceeding by way of an Application. For the purposes of the *CJPTA*, Ucore's Application is a proceeding.

[57] Part I of the *CJPTA* provides a complete code for the determination of the territorial competence of a court.

[58] Section 2(h) defines "territorial competence" as follows:

> 2(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.

[59] Section 3(2) makes clear that the territorial competence is to be determined by reference to Part I of the *Act* and only Part I of the *Act*:

> **Territorial competence of the court**
>
> 3(2) The territorial competence of a court is to be determined solely by reference to this Part.

[60] Section 4 of the *Act* outlines when a court has territorial competence:

> **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.

[61] Section 4 is disjunctive and the court will have territorial jurisdiction if any one of the circumstances exist in that section. Of significance for this ground of appeal is s. 4(b) which provides that a court will have territorial competence if "during the proceeding a person submits to the court's jurisdiction".

[62] IBC does not contest that it has submitted to the jurisdiction of the Nova Scotia Courts with respect to the pleadings filed by Ucore on December 11, 2018. It only takes issue with the claims in the Amended Application.

[63] There are a number of problems with IBC's position that it did not submit to the jurisdiction of the Court on the Amended Claims.

[64] First, it does not dispute the Court's territorial jurisdiction over Ucore's proceeding as originally drafted. The Amended Application (now an Action) is not a new proceeding - it is the same proceeding. The *Civil Procedure Rules* clearly contemplate that the Application can be converted to an Action. There can be amendments to the Action or the Application.

[65] In this proceeding, not only did IBC recognize that to be the case, it suggested that it was going to convert the proceeding to an Action and present its own claim, citing at various times the complexity of the proceedings from both parties' point of view. IBC's counsel went so far as to suggest that Ucore would probably need to amend its pleadings (see correspondence dated February 22, 2019, ¶21 above).

[66] It is not as if IBC was taken by surprise by the amendments; it had the draft amendments as early as March 6, 2019. It knew the nature and extent of the amendments.

[67] On March 13, 2019, IBC indicated that it would not oppose the amendments to the Application. In the same correspondence, it indicated that it had not filed its Notice of Contest, citing the fact that it needed to respond to the interlocutory injunction and it also seemed clear to it that it was necessary to convert the matter to an Action.

[68] IBC contemplated that the motion to amend the pleading would be a step in the proceeding. It had full knowledge of the contents of the amendments. It stated unequivocally that it did not oppose the motion. To suggest that IBC did not submit to the jurisdiction of the Court with respect to the amended proceeding rings hollow and is untenable.

[69] It is difficult to imagine what else would be necessary in order for a party to submit to the jurisdiction of a court. IBC did not indicate that it had any difficulty with or objection to the jurisdiction of the Nova Scotia Courts at any time in addressing the amendment motion.

[70] IBC attempts to buttress its position that it has not submitted to the jurisdiction of the Nova Scotia Courts by downplaying the breadth of the relief sought in the original Application filed – suggesting that the claims relate only to the defamatory conduct of IBC.

[71] A review of the original Application makes clear that it was much broader than simply damages in defamation. The original Application sought damages for the defamatory statements and for the economic loss to be suffered by the company

as a result of that conduct. It also went much further, claiming damages for loss of market capitalization and related damages for unlawful interference with economic relation. IBC's former counsel repeatedly recognized the complex nature of the proceeding and the significant relief being sought (see letters of February 1 and February 12, 2019 and the Press Release of March 4, 2019). It was not simply a defamation action.

[72] The appellants also mischaracterize the findings of the Motions Judge in ¶20 of his decision. In its factum, the appellants say the Motions Judge found that the "Amended Claims were essentially the same" as the original proceeding:

> 57. The Learned Chambers Judge found that the Appellants had actually attorned in relation to the Amended Claims. The conclusion seems to stem from two findings: (i) at para. 20 of the Decision, the Learned Chambers Judge stated that the Amended Claims were "essentially the same or an extension" of the original defamation pleading and that it therefore made sense to have them heard together; and (ii) attornment occurred by statements in the three letters from the Appellants' former Counsel to the Court which post-date the March 6, 2019 delivery of the Respondent's Notice of Motion which included the request for leave to amend the pleading.

[Emphasis added]

[73] With respect, the Motions Judge did not say that the Amended Claims were essentially the same or an extension of the original ones. What he said was that the "facts underlying the original and amended claims are essentially the same or an extension of one to the other":

> [20] In any case, I am of the view that the facts underlying the original and amended claims are essentially the same or an extension of one to the other and it makes sense to have them heard in one proceeding.

[74] This is a finding of fact. If the factual foundation for both the original and amended applications are the same (as the Motions Judge found) and IBC takes no issue with the court's jurisdiction over the original Application then, there is no principled reason why the Court would not have jurisdiction over the Amended Claims.

[75] Further, IBC cannot ignore the steps taken by its previous counsel in addressing both the original Application and the Amended Claim.

[76] At ¶16 and 17 of his decision, the Motions Judge specifically considered six steps taken by IBC – all but one of which were taken before raising any jurisdictional issue:

> [16] Prior to the Notice of New Counsel being filed on March 25, 2019, Mr. Moir represented IBC and Izatt up until the Order of March 20th. I have carefully reviewed the affidavits and Court file so as to determine what he did on behalf of his clients and note as follows:
>
> (a) Appeared at the January 15, 2019 Motion for Directions and consented to deadlines for filing its Notice of Contest and Respondents' Claim;
>
> (b) Secured the Consent Order from [Ucore] extending those filing deadlines, on the basis that its anticipated Respondents' Claim was complex and required lengthy and careful review in order to appropriately draft the pleadings;
>
> (c) Advised Ucore that "the claims in the Notice of Respondents' Claim are significantly expanded from the Utah Pleading", with counsel agreeing to provide an advanced outline of those claims as soon as he was able;
>
> (d) Consented to an interim injunction, enjoining it from advancing its purported termination of the Option Agreement;
>
> (e) Twice indicated that it did not oppose Ucore's amended claims – the first time, notably, after having reviewed those claims but weeks before raising any jurisdictional challenge;
>
> (f) Sought to convert the format of the proceedings from an Application to an Action – both publicly, and in communication with Ucore and the Court.
>
> [17] All the while, at no time did Mr. Moir advise that he was raising the jurisdiction issue. When I consider the totality of these steps, it is clear to me that IBC and Izatt were doing much more than setting the stage for this Motion today. Accordingly, I am of the view that *Fraser v. 4358376 Canada Inc.*, 2014 ONCA 553, and *SRU Biosystems, Inc. v. Hobbs*, 2006 CanLII 7525 (ON SC), are distinguishable as they dealt with "procedural steps brought within in the confines of a jurisdiction motion" under the Ontario *Civil Procedure Rules*. Indeed, I find *Kinch v. Pyle*, (2004) 8 CPC (6tth) (Ont Sup Ct. J), *and Wolfe v. Wyeth*, 2011 ONCA 347, to be more analogous to this case and refer to *Wolfe* and the Ontario Court of Appeal's words at para. 44:

[Emphasis added]

> [**W]hen a party to an action appears in court and goes beyond challenging the jurisdiction of the court** based on jurisdiction simpliciter and forum non conveniens, **the party will be regarded as appearing**

> **voluntarily, thus giving the court consent-based jurisdiction. That is what happened here**.
>
> [Emphasis in original]

[77] There are other acts not specifically mentioned by the Motions Judge, that support a submission to the jurisdiction of the Nova Scotia Courts:

- Rather than challenging jurisdiction (and in the face of its two pending Utah complaints) IBC consented to the injunction on February 27, 2019;
- IBC had knowledge of Ucore's jurisdictional challenge in Utah as of February 27, 2019. IBC did not raise a parallel jurisdictional dispute in Nova Scotia. Instead, IBC sought to avail itself of the Nova Scotia court process by seeking a sealing order over the Option Agreement and other documents at issue in the Amended Claims. In doing so, IBC did not advise it was seeking to seal those documents in order to advance a jurisdictional challenge to the Amended Claims in Nova Scotia; and
- Mr. Izatt personally wrote to the Court on March 18, 2019, requesting an adjournment of the interlocutory injunction. His correspondence makes no mention of any jurisdictional issue.

[78] It is abundantly clear on the facts of this case that the appellants have submitted to the territorial competence of the Nova Scotia Supreme Court with respect to the Amended Claims. The Motions Judge did not err in so finding.

[79] I would dismiss this ground of appeal.

Issue #3 Did the Motions Judge err in failing to conduct the necessary analysis with respect to jurisdiction under Section 11 of the *CJPTA* in relation to the Amended Claims?

Standard of Review

[80] This Court in *Bouch v. Penny*, 2009 NSCA 80 set out the standard of review when determining where jurisdiction was found on a "real and substantial connection" to Nova Scotia under s. 11 of the *CJPTA*.

[81] In *Bouch*, the Court explained that a judge is required to apply the correct legal test when considering the existence of a real and substantial connection.

Determining a real and substantial connection amounts to the application of a legal standard to a set of facts, which is a question of mixed fact and law with a predominant factual component, prompting a standard of review based on palpable and overriding error. The inquiry is largely fact-driven and attracts a high degree of deference (¶26-27).

Analysis

[82] It is not necessary to consider this ground of appeal as I am satisfied that the appellants have submitted to the territorial competence of the Nova Scotia Courts. However, as it has been raised in both the Notice of Appeal and Notice of Contention and Justice Chipman used it as an alternative basis for finding jurisdiction, I will address it.

[83] Section 11 of the *CJPTA* creates a rebuttable presumption of a real and substantial connection. The subsections applicable to this ground of appeal are:

> **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
>
> …
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
>
> (ii) by its express terms, the contract is governed by the law of the Province, or
>
> (iii) the contract
>
> (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
>
> (B) resulted from a solicitation of business in the Province by or on behalf of the seller;
>
> …
>
> (g) concerns a tort committed in the Province;
>
> (h) concerns a business carried on in the Province;

[84] Although the Motions Judge included his analysis on real and substantial connection in the portion of his decision on *forum non conveniens*, that does not negate the fact that he did address the issue. He said:

> [24] When I examine the comparative convenience I must start by observing that IBC is operated out of Utah and that Ucore has a real and substantial connection to Nova Scotia. In this latter regard the evidence discloses, among other things as follows:
>
> (1) Ucore's contractual obligations under the Option Agreement have occurred and will occur substantially in Nova Scotia, pursuant to s. 11(e) of the *CJPTA*;
>
> (2) A tort (defamation) actually occurred in Nova Scotia, pursuant to s. 11(g) of the *CJPTA*; and
>
> (3) Ucore carries on business in Nova Scotia, pursuant to s. 11(h) of the *CJPTA*.

[85] The Motions Judge relied upon ss. 11(e), (g) and (h) of the *CJPTA* in finding that there was a real and substantial connection to Nova Scotia. Although the analysis and its placement within the reasons are not ideal, I am satisfied the Motions Judge properly identified s. 11 as the law that he needed to apply to the facts in determining whether there was a real and substantial connection. I see no error in his analysis.

[86] I will comment further upon the appellants' argument that IBC must carry on business in Nova Scotia for the presumption in s. 11(h) of the *CJPTA* to apply. In their factum, the appellants say:

> 90. Subsection 11(h) of the CJPTA states that a real and substantial connection between Nova Scotia and the facts on which the Amended Claims are based is presumed to exist if the proceeding "concerns a business carried on in the Province". <u>The Appellants say that the proper interpretation of that Subsection is that the "business" in question must be the Appellants' (defendants') business</u>.
>
> 91. The Appellants recognize that the interpretation of Subsection 11(h) which they propose is different from interpretations by the Supreme Court of Nova Scotia; however, this Honourable Court has not ruled on the point and therefore the issue remains open for it to do so.
>
> [Emphasis added]

[87] In *Armco Capital Inc. v. Armoyan*, 2010 NSSC 102 Moir, J. addressed a similar argument to that of the appellants:

[29] Paragraph 4(e) provides "there is a real and substantial connection between the Province and the facts on which the proceeding...is based." This is the basis upon which Nova Scotia has territorial competence in relation to the cause advanced by Armco. The causes, the facts in need of proof, have a real and substantial connection to this province.

[30] Firstly, the statute provides a presumption in favour of real and substantial connection in a proceeding that "concerns a business carried on in the Province": s. 11(h). On behalf of Ms. Armoyan, Ms. McGinty argues that this only applies in cases that concern a business carried on in the province by a non-resident defendant or respondent.

[31] Ms. McGinty says that s. 11(h) is illogical and redundant when it is read as being applicable to a resident, corporate plaintiff or defendant. Her argument turns on s. 8, which provides principles for determining residency of a corporation and the common law principle that service on a defendant corporation carried out within the province does not necessarily give jurisdiction:

> A foreign corporation may be served in any of the common law provinces or territories if service of the originating process can be made upon it in accordance with the local rules of practice. Generally, this is the case when the corporation or other legal person has or is required to have a registered office or business address, or an agent for service; or where it has a place for carrying on business or where it is carrying on business. This may not be sufficient however, for the court to exercise jurisdiction, particularly where its business connections with the jurisdiction have ceased and were unrelated to the claim advanced.

Jean-Gabriel Castel and Janet Walker, *Canadian Conflict of Laws*, 6th ed. (Markham: Butterworths, 2005).

[32] Paragraph 11(h) has nothing to do with residency or with service on a corporation. <u>It is about a business, no matter whether it is carried on by a resident or a non-resident, or a corporation or an individual</u>.

[33] The words of a statute are to be read in their entire context according to their grammatical and ordinary meaning. I see no conflict between s. 11(h) and any other part of the *Court Jurisdiction and Proceedings Act*. <u>The words are plain, and we cannot add restrictions</u>.

[34] I find support from my conclusion that s. 11(h) applies to a business carried on in the province by any party in *TimberWest Forest Corp. v. United Steel, Paper and Forestry Union*, [2008] B.C.J. 552 (S.C.), to which Mr. Piercey and Mr. Campbell referred.

[35] The cause prosecuted by Armco concerns a business carried on in Nova Scotia. Therefore, this court is presumptively competent.

[Emphasis added]

[88] I agree with Moir, J. There is nothing in s. 11(h) which would admit of the restriction suggested by IBC.

[89] The Motions Judge found that Ucore had established a presumptive, real and substantive connection by ss. 11(e), (g) and (h) of the *CJPTA*. His decision is entitled to deference.

[90] I would dismiss this ground of appeal.

Issue #4 Did the Motions judge err in law in concluding that attornment operates as a bar to alleging that Nova Scotia is *forum non conveniens*?

Standard of Review

[91] The question of whether the doctrine of *forum non conveniens* is available to a party who has submitted to the jurisdiction of a court is a question of law and, therefore as such, is to be considered on a standard of correctness.

Analysis

[92] At ¶21 of the Motions Judge's decision, he held:

> [21] Having considered this matter in its entirety, I am of the view that IBC and Izatt lost their ability to challenge this Court as the most convenient forum once they attorned to this jurisdiction…

[93] With respect, this was an error of law.

[94] For ease of reference I will set out the applicable statutory provisions again. Section 2(h) defines "territorial competence" as follows:

> 2(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.

[95] Section 4 sets out when a court has territorial competence. The applicable provisions provide:

> 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.

[96] There is no distinction in s. 4 between obtaining territorial competence by way of submission to the jurisdiction (attornment) or by way of any of the other sub-sections. Territorial competence is territorial competence.

[97] If territorial competence is shown, s. 12 of the *Act* comes into play. It provides as follows:

> 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.

[98] Section 12 does not preclude consideration of *forum non conveniens*, based on how territorial competence is found.

[99] Once it is determined that there is jurisdiction, the inquiry then becomes whether the court should exercise its discretion to decline jurisdiction. In *Bouch*, Saunders, J.A. explained:

> [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*). <u>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</u>. 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. <u>The CJPTA is the product of the Uniform Law Conference of Canada. ... It admits of no exceptions</u>.
>
> [Emphasis added]

[100] There is nothing in the *CJPTA* which would prevent the consideration of *forum non conveniens* under s. 12 on the basis that a party has submitted or attorned to a court's jurisdiction.

[101] In finding that attornment amounted to a bar to the consideration of *forum non conveniens*, the Motions Judge erred.

[102] I would allow this ground of appeal

Issue #5 Did the Motions Judge err in finding that Nova Scotia is the most convenient forum for determination of the Amended Claims?

Standard of Review

[103] In *Armoyan v. Armoyan*, 2013 NSCA 99, leave to appeal ref'd [2013] S.C.C.A. No. 446, Fichaud, J.A. set out the standard of review where the issue is one of *forum non conveniens*:

> [207] In *Éditions Écosociété Inc. v. Banro Corp.*, [2012] 1 S.C.R. 636, Justice LeBel for the Court described the appellate standard of review:
>
> > [41] The application of *forum non conveniens* is an exercise of discretion reviewable in accordance with the principle of deference to discretionary decisions: an appeal court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision (see *Young v. Tyco International of Canada Ltd.*, [2008 ONCA 709], at para 27).

Analysis

[104] The wording in s. 12(2) is imperative. A judge, in deciding the question of whether a court outside the province is a more appropriate forum, must consider all the circumstances relevant to the proceeding, including the factors enumerated in s. 12(2).

[105] It is clear that the analysis regarding the jurisdiction *simpliciter* of the court under s. 11 is distinct from the discretionary analysis codified in s. 12 of the *CJPTA* and must be conducted separately.

[106] In *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, the Supreme Court of Canada affirmed the Ontario Court of Appeal on this issue, stating:

> [56] Sharpe J.A. reaffirmed the need to draw a clear distinction between assuming jurisdiction and deciding whether to decline to exercise it on the basis of the *forum non conveniens* doctrine. He cautioned against confusing these two different steps in the resolution of a conflicts issue and emphasized that the factors that would justify a stay in the *forum non conveniens* analysis should not be worked into the jurisdiction *simpliciter* analysis (paras. 81-82 and 101) [...].

[107] The Supreme Court of Canada concluded on this point:

> [101] As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper

application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.

[108] The Motions Judge's analysis of the factors in s. 12 is as follows:

> [22] I would add that even if I am wrong in the above determination, based on all of the evidence I am of the view that Nova Scotia is the most convenient forum. In this regard, I accept the factors for consideration are as set out in s. 12 of the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*).
>
> […]
>
> [24] When I examine the comparative convenience I must start by observing that IBC is operated out of Utah and that Ucore has a real and substantial connection to Nova Scotia. In this latter regard the evidence discloses, among other things as follows:
>
> (1) Ucore's contractual obligations under the Option Agreement have occurred and will occur substantially in Nova Scotia, pursuant to s. 11(e) of the *CJPTA*;
>
> (2) A tort (defamation) actually occurred in Nova Scotia, pursuant to s. 11(g) of the *CJPTA*; and
>
> (3) Ucore carries on business in Nova Scotia, pursuant to s. 11(h) of the *CJPTA*.
>
> [25] Further, I accept the Peter Manuel affidavit evidence which establishes:
>
> (a) All of the day-to-day business of Ucore is either conducted at, or directed from, the Bedford head office.
>
> (b) In addition to directing its business out of Bedford, all of the key individuals involved in Ucore's business, except two, reside in the Halifax, Nova Scotia area.
>
> (c) All of Ucore's corporate records are located in Nova Scotia.
>
> (d) Ucore's primary bank accounts are in Nova Scotia.
>
> (e) Ucore's primary securities regulator is the Nova Scotia Securities Commission.
>
> [26] I would add that Mr. Izatt's reply affidavit attaches press releases from Ucore which confirm the Nova Scotia connection, as it is Halifax where the press releases are issued from and Mr. Jim MacKenzie is named as the contact with a '902' phone number.
>
> [Emphasis added]

[109] With respect, although the Motions Judge identified the proper test for determining the appropriate forum, he failed to properly apply it.

[110] Section 12 of the *CJPTA* is a complete codification of the common law test for *forum non conveniens*. All of the factors listed in s. 12 must be considered. The Supreme Court of Canada in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 referred to the six factors as "mandated for consideration" by the *Act* (¶ 32).

[111] Saunders, J.A. cited *Teck Cominco* in *Bouch* in explaining the effect of the *CJPTA*:

> [58] […] 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 (CanLII), 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.

[112] The Motions Judge did not consider each of the factors enumerated in section 12 of the *CJPTA*. While s. 12(2) does not represent an exhaustive list of factors, judges must, at least, consider those six factors. If, in a particular case, certain of these factors are insignificant, the judge should say so.

[113] The Motions Judge addressed the factors at ss. 12(2)(a), (c), (d), and (f) of the *CJPTA* in his decision.

[114] The Motions Judge weighed the comparative convenience under s. 12(2)(a) of the *CJPTA* at ¶24-27 set out above.

[115] While not neatly confined to one portion of his decision, the Motions Judge clearly considered the desire to avoid a multiplicity of proceedings under s. 12(2)(c) of the *CJPTA*, and the desire to avoid conflicting decisions in different courts under s. 12(2)(d) of the *CJPTA*. In paragraphs 19 and 20 of his decision he says:

> [19] From the Motion materials filed by the moving parties, it is clear they do not contest Nova Scotia's jurisdiction over the original claims filed late last year.

> For this reason, were I to grant their requested Order, the result would be a lawsuit here and two others in Utah. A multiplicity of proceedings would hardly be an economical and/or efficient use of the Courts' time, to say nothing of the parties. I am mindful of *Banro Corp. v. Éditions Écosociété Inc*, 2012 SCC 18, *Check Group Canada Inc. v. Icer Canada Corporation*, 2010 NSSC 463, and *Han v. Cho*, 2006 BCSC 1623, and adopt their reasoning on this point.
>
> [20] In any case, I am of the view that the facts underlying the original and amended claims are essentially the same or an extension of one to the other and it makes sense to have them heard in one proceeding.

[116] The Motions Judge cites three decisions and adopts the reasoning in those three decisions as his own. He does not cite which specific portions of the decisions he is referencing. However, because he is addressing a multiplicity of proceedings, it is reasonable to assume he is referring to the portions of the decisions that address that issue. It is not necessary to refer to all three decisions. I will simply refer to Murphy, J.'s reasons on the issue in *Check Group Canada Inc. v. Icer Canada Corp.*, 2010 NSSC 463:

> [53] Avoidance of multiple proceedings and conflicting decisions are closely‑related factors that I will address together. As noted previously, the plaintiff's alternative claims must be heard in Nova Scotia because they fall under the exclusive jurisdiction of this Court. This means that if the plaintiff's primary claims are heard in Québec there will be multiple proceedings. Further, the facts underlying both sets of claims are so closely intertwined that the multiple proceedings would be adjudicating almost identical facts and issues. This has the potential to lead to conflicting decisions in different courts. Both these factors strongly support hearing the matter in Nova Scotia.
>
> [54] The fair and efficient working of the Canadian legal system also supports hearing the matter in Nova Scotia. I have found that it would be unfair to the plaintiff to split this case between two Canadian provinces, and it would not be unfair for the Choueke defendants to defend the action in Nova Scotia. Judicial resources are scarce across Canada. In the absence of a binding choice of jurisdiction clause, fairness and efficiency demand hearing a matter that has claims connected to multiple forums in the forum that has exclusive jurisdiction over at least some of the claims. This also strongly supports hearing the matter in Nova Scotia.
>
> [Emphasis added]

[117] In this part of his judgment, the Motions Judge recognized that if Nova Scotia declined jurisdiction over the Amended Claims, the same facts and process would have to be proven and undertaken in Nova Scotia and Utah and could result in conflicting decisions.

[118] As Justice Murphy noted, a multiplicity of proceedings adjudicating almost identical facts and issues has the potential for conflicting decisions in different courts.

[119] I am also satisfied that the Motions Judge considered the fair and efficient working of the Canadian legal system as a whole under s. 12(2)(f) of the *CJPTA* when he stated that "[a] multiplicity of proceedings would hardly be an economical and/or efficient use of the Courts' time, .." (¶19).

[120] The factors in s. 12(2)(b) (the law to be applied to issues in the proceeding) and (e) (the enforcement of an eventual judgment) are not addressed in the Motions Judge's decision. His failure to address those factors amounts to an error in law.

[121] In *Bouch,* Justice Saunders found that it must be clearly established that there is a more appropriate forum to displace the forum selected by the plaintiff:

> [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.
>
> [Emphasis added]

[122] I will now turn to the record to see if IBC has shown that the two factors the Motions Judge failed to consider would have impacted his ultimate determination.

(i) *the law to be applied*

[123] In making its submissions and discussing the law to be applied to the issues in the proceedings, IBC provided no evidence to the Motions Judge that there would be any issue regarding the law to be applied. IBC made submissions to the Motions Judge that there may be a difference in the law, but it did not provide any

support for this position. The following exchange took place between IBC's counsel and the Court during the hearing:

> **MR. AUCOIN:** […] The next factor is the law to be applied, and both, as has already been stated and Your Lordship recognized, the option agreement and the research agreement, both point to Alaska as the governing law. Alaska is not Utah, and, as has been pointed out, there is not evidence before the Court about those laws, but our position is that an American court is in a better position to deal with other American law than a Canadian court; similarly, that if, if the choice was between Nova Scotia courts dealing with Ontario laws versus dealing with law from Georgia or some other state, it would be in a better position.
>
> **THE COURT:** Is there … Am I supposed to have expert evidence to back that up, or is that …
>
> **MR. AUCOIN:** We don't have expert evidence to back that up.
>
> **THE COURT:** No. So it's just … I mean, I don't know, some states may have laws similar to Nova Scotia. I know some of our laws may be modelled after American laws and vice versa. Maybe not vice versa, I don't really know. But I guess, you just say what you just said stands to reason, or is there some authority for that?
>
> **MR. AUCOIN:** I don't have authority for it, but two points on that: there's, there's certainly no Nova Scotia law pursuant, governing those agreements, and the law with respect [to] tort, we submit, would be Utah law.
>
> **THE COURT:** Yeah. I suppose it would be for an expert down the road, whether it happened to be in Nova Scotia or Utah, you see what I mean?
>
> **MR. AUCOIN:** Quite right, yes.
>
> **THE COURT:** Yeah. Okay. All right.
>
> …
>
> [Emphasis added]

[124] IBC presented no authority for its suggestion that a Utah court would be in a better position to apply Alaskan law than a Nova Scotia court. In addition, it is clear that neither party is proposing Alaska as the most appropriate forum.

[125] In my view, on the record, this is at best a neutral factor and could not have influenced the analysis on the choice of forum. To rely on counsels' submissions, without more, would have been mere speculation.

(ii) e*nforcement of the eventual judgment*

[126] This factor was also discussed between counsel and the Motions Judge.

[127] I will once again refer to the submissions of IBC to the Motions Judge:

> **MR. AUCOIN:** My Lord, the next factor raised was enforcement of an eventual judgment, and my friends have put forward some limited, very limited caselaw, one case that a Canadian judgment, simply a Canadian judgment could be enforced in Utah, although I think that's far from where we are at this point, in terms of a Nova Scotia judgment specific to these facts and these claims being enforced in Utah. In any event, claims against IBC can certainly be enforced in Utah, because that's where they have assets. It doesn't appear that either party has assets in Nova Scotia that could be enforced upon.
>
> And My Lord, I'll just, you've no doubt read it, but in the, at tab 8, in the appeal of the **Armstrong** decision, Justice Fichaud discussed, at paragraphs 55 and 56, the fact that having a long drawn out trial for a remedy that couldn't be enforced in the Province would be a hapless remedy and a waste of resources. We say that that situation would exist in this case, as well.

[128] The case IBC's counsel referred to is *3289444 Nova Scotia Limited v. R.W. Armstrong & Associates Inc.*, 2018 NSCA 26.

[129] The defendants in *R.W. Armstrong* were based in the United Arab Emirates (UAE). With respect, that case is clearly distinguishable. In *R.W. Armstrong*, all of the factors under s. 12 favoured the UAE as the convenient forum. In discussing the factors under s. 12(2)(e) and (f), Fichaud, J.A. held:

> [55] Sections 12(2)(e) and (f): The Numbered Company's Notice of Action seeks damages and supervisory remedies – an accounting and an injunction. These can only be enforced where MASDAR and RWA have a presence. The remedies would be ineffectual in Nova Scotia.
>
> [56] A long Nova Scotia trial that generates a hapless remedy is not the most efficient working of the Canadian legal system under s. 12(2)(f).

[130] Ucore is seeking more in its Amended Claims than simply the supervisory remedies described as "hapless" in *R.W. Armstrong*. Nor was there any evidence from IBC that a Nova Scotia judgment would not be enforceable in Utah.

[131] With respect, IBC's submissions on this issue are simply assertions without any factual foundation.

[132] The respondent countered in its submissions as follows:

> **MS. REGAN-COTTREAU: …** Also, we would suggest that enforcement of a decision is, at best, [a wash]. Ucore is claiming for more than just defamation – obviously, not in Illinois like the **Black and Breeden** case – and there's no evidentiary basis to suggest that a decision would not be [enforced] in Utah. And in fact, Ucore has assets in Nova Scotia that IBC could realize on here as well. So at best, we would suggest that, that doesn't favour either party or either jurisdiction.

[133] I agree with the respondent that there is a complete lack of an evidentiary basis to suggest that a Nova Scotia judgment would not be enforceable in Utah.

[134] In its motion brief before the Motions Judge, Ucore included a case from the United States Court of Appeals for the Tenth Circuit, *Smith v. Toronto-Dominion Bank*, case no. 98-4008, 1999 U.S. App. LEXIS 1184 (10 Cir. Jan. 29, 1999). That case provides some insight to the approach taken by the Utah courts to enforcing Canadian judgments.

[135] In the body of the judgment, the Court cites *Hilton v. Guyot,* 159 U.S. 113:

> …The principles of comity require recognition of a foreign judgment if
>
> > there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice to the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment.
>
> *Hilton, 159 U.S. at 202*.
>
> Given the Utah Supreme Court's statements in *Mori*, as well as the long history of other courts recognizing **Canadian judgments** under principles of comity, see, e.g., *Ritchie v. McMullen, 159 U.S. 235, 240-43, 40 L. Ed. 133, 16 S. Ct. 171 (1895)* (***Canadian judgment enforced*** in federal diversity action filed in Illinois); 1976) (***Canadian judgment*** recognized as … one from "a sister common law jurisdiction with procedures akin to our own"); *Harrison v. Triplex Gold Mines, 33 F. 2d 667, 672-73 (1st Cir. 1929*) (affirming dismissal of action seeking to enjoin defendants from ***enforcing*** a ***Canadian judgment***), we find it reasonable to believe the Utah courts would likewise recognize a ***Canadian judgment*** if that judgment satisfied the requirements outlined in *Hilton* and otherwise comported with Canadian law. *See generally Phillips, 77 F. 3d at 360* (predicting Kansas courts would recognize valid Australian judgment).

[136] The Court of Appeal upheld the state court's decision to enforce an Ontario judgment in Utah.

[137] This certainly supports the position that a Canadian judgment, rendered by a court of competent jurisdiction, after a full and fair trial, would be recognized by the Utah courts. IBC's suggestion that a judgment from a Canadian court would be a "hapless" remedy against a Utah company is, again, an assertion without any supporting evidence or authority.

[138] As a result, I am not satisfied that the consideration of the effectiveness of the enforcement of the eventual judgment would have favoured Utah as the more appropriate forum.

Conclusion

[139] As a result, after a thorough review of the record and the oral and written submissions of counsel, I am satisfied that a consideration of ss. 12(2)(b) and (e) of the *CJTPA* would not have changed the result in this case. It would be a waste of time, effort and resources to send it back for a rehearing on the *forum non conveniens* issue.

[140] I would dismiss this ground of appeal.

Disposition

[141] I would grant leave to appeal but dismiss the appeal with costs to the respondent in the amount of $2,000 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Fichaud, J.A.