

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** CKF Inc v. Huhtamaki Americas Inc., 2009 NSSC 21

**Date:** 20090121

**Docket:** SH 298635

**Registry:** Halifax

**Between:**

CKF Inc.

Plaintiff/Respondent

v.

Huhtamaki Americas, Inc. and Huhtamaki Company Manufacturing

Defendant/Applicant

**Judge:** The Honourable Justice Frank Edwards

**Heard:** December 10, 2008, in Halifax, Nova Scotia

**Counsel:** David P.S. Farrar, Q.C., and Daniela Bassan, for the  
plaintiff/respondent  
Daniel M. Campbell, Q.C., for the defendant/applicant

**TABLE OF CONTENTS**

OVERVIEW .....	3
PART I - FACTS AND PROCEEDINGS .....	4
A. Identification of the Parties .....	4
B. CKF's Operations .....	4
C. The 1957 and 1978 Agreements .....	7
D. The Parties' Dispute .....	9
E. CKF's Action in Nova Scotia .....	11
F. Huhtamaki's Complaint in Maine .....	13
G. Huhtamaki's Application in Ontario .....	15
PART II - ISSUES .....	17
PART III - LAW AND ANALYSIS .....	18
A. Huhtamaki Does Not Meet Strike Test .....	18
1. General Legal Principles - Reasonable Cause of Action .....	18
2. General Legal Principles - Availability of Declaratory Relief ..	19
3. Application to the Facts .....	22
B. Nova Scotia is the More Appropriate Forum .....	26
1. Overview of CJPTA in Nova Scotia .....	27
2. Jurisprudence in Other Provinces .....	29
3. Application to the Facts .....	32
CONCLUSION .....	41

**By the Court:**

[1] **Overview:** The Defendants (collectively "Huhtamaki") apply for an Order to: (a) strike the Statement of Claim as allegedly disclosing no reasonable cause of action under Civil Procedure Rule 14.25; and (b) alternatively, to stay or transfer this action to the Ontario Superior Court of Justice and the United States District Court for the District of Maine pursuant to the Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003, c. 2 (proclaimed June 1, 2008) ("CJPTA").

[2] I agree with the Plaintiff/Respondent's submission that Huhtamaki's Application is without merit on both fronts. In particular, Huhtamaki has failed to demonstrate that any part of the Statement of Claim is somehow "plain and obvious" to fail. With respect to the CJPTA, Huhtamaki does not meet the test for a stay or transfer of proceedings since Nova Scotia—not Ontario or Maine—is the more appropriate forum to hear this proceeding. I have carefully reviewed the Parties' written and oral submissions. The Plaintiff/Respondent's written submission is a complete answer to the Defendant/Applicant's application. I therefore adopt the Plaintiff/Respondent's written submissions with minor non-substantive changes as my written decision. It reads as follows:

***PART I – FACTS AND PROCEEDINGS***

[3] **A. Identification of the Parties:** CKF Inc. (“CKF”) is a company incorporated pursuant to the laws of Nova Scotia and has a registered office at 48 Prince Street, Hantsport, Nova Scotia. CKF's previous name was Canadian Keyes Fibre Company Limited. All of the directors of CKF are residents of Nova Scotia and six of nine officers of CKF are residents of Nova Scotia, including the Chairman, CEO & President.

Affidavit of Robert G. H. Patzelt sworn October 8, 2008 ("Patzelt Affidavit"), para. 2.

[4] Huhtamaki Company Manufacturing and Huhtamaki Americas, Inc. are related companies incorporated pursuant to the laws of the State of Delaware with corporate offices in De Soto, Kansas, USA. Huhtamaki's predecessor was Keyes Fibre Company.

Patzelt Affidavit, paras. 3-5.

[5] **B. CKF's Operations:** CKF, which was established in 1933 in Nova Scotia, manufactures and sells molded pulp products in Canada ("CKF's Products"). CKF's Products include an extensive line of tableware products (e.g. bowls, plates,

platters, etc.) and a variety of packing products including containers, trays, and cartons. CKF's Products, which are manufactured in both smooth and rough finishes, are supplied through various channels including at retail and wholesale levels.

Patzelt Affidavit, para. 6

[6] CKF's Products are sold throughout Canada in association with a family of CHINET-related trade-marks, including the registered trade-marks ROYAL CHINET and ROYAL CHINET & Design and other registered and unregistered trade-marks owned by CKF ("*CKF's Family of CHINET Trade-marks*").

Patzelt Affidavit, para. 7

[7] CKF's corporate offices and business / financial operations for Canada are headquartered in Nova Scotia. The full range of CKF's Products is manufactured at its primary plant in Hantsport which has been in existence since 1933.

Patzelt Affidavit, para. 8

[8] The raw material for CKF's Products is sourced by, and under the direction of, a related Nova Scotia company, Scotia Recycling Limited, as well being sourced directly by CKF. Some of CKF's energy requirements are directly and indirectly supplied from a related Nova Scotia company, Minas Basin Pulp and Power Company Limited. Corporate resources for CKF, including legal, accounting, executive, and administrative functions, are sourced from Scotia Investments Limited, another related Nova Scotia company. As of June 11, 2008, CKF had over 300 employees in Nova Scotia.

Patzelt Affidavit, paras. 8-9

[9] CKF operates a separate facility in Rexdale, Ontario, which does not manufacture any molded pulp products but, rather, only produces polystyrene (foam) products. CKF also leases space and operates a small, secondary corporate office in Rexdale. CKF has a third facility in Langley, British Columbia. The Langley facility produced only polystyrene (foam) products until the end of 2007, when it first began producing some molded pulp products. The Langley facility uses different technology and different machinery than that used in the Hantsport plant. The Rexdale and Langley facilities were not acquired by CKF until the

1970s. There are more employees of CKF located in Nova Scotia than in any other province in Canada.

Patzelt Affidavit, para. 9

[10] CKF does not have any corporate offices, employees, or officers in the United States.

Patzelt Affidavit, para. 9

[11] **C. *The 1957 and 1978 Agreements:*** On October 22, 1957, CKF and Huhtamaki's predecessor entered into an agreement (the "***1957 Agreement***") whereby CKF was granted an exclusive license to use throughout Canada certain patents, technical information, and trade secrets related to molded pulp products. Section 13 of the 1957 Agreement stated: "This agreement shall be construed in accordance with the laws of the State of Maine, U.S.A., and each of the parties hereby submits itself to the jurisdiction of the Courts of Maine for the adjudication of all matters arising herefrom."<sup>1</sup>

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<sup>1</sup> CKF and Huhtamaki have filed conflicting expert evidence on the meaning of section 13 of the 1957 Agreement under Maine law. CKF's position is that section 13 is *permissive* or *non-exclusive* vis-à-vis the jurisdiction of Maine. As such, section 13 does not preclude a Nova Scotia Court from asserting jurisdiction over this proceeding. This issue is further discussed in Part III below.

Patzelt Affidavit, para. 10 and Exhibit "H"

[12] On August 9, 1967, the 1957 Agreement was amended to provide for an initial term to October 22, 2007.

Affidavit of Clay Dunn sworn September 22, 2008 ("Dunn Affidavit"), Exhibit "B"

[13] On October 1, 1975, Huhtamaki's predecessor assigned its rights and obligations to certain patents, technical information, and trade secrets under the 1957 Agreement to Minas Basin Pulp and Power Company Limited. The assignment does not contain any provision regarding the jurisdiction of any particular court to determine disputes between the parties.

Patzelt Affidavit, para. 11 and Exhibit "I"

[14] On October 2, 1978, CKF and Huhtamaki's predecessor entered into an agreement (the "1978 Agreement") whereby CKF was granted exclusive rights to key trade-marks (in CKF's Family of CHINET Trade-marks) for use in Canada. The Preamble to the 1978 Agreement refers to the 1957 Agreement and subsequent



assignment of rights in 1975. However, the 1978 Agreement does not contain any provision regarding the jurisdiction of any particular court to determine disputes between the parties.

Patzelt Affidavit, para. 12 and Exhibit "J"

[15] By assignments dated January 26, 1979 and April 2, 1986, Huhtamaki's predecessor assigned to CKF key trade-marks (in CKF's Family of CHINET Trade-marks) for use in Canada. The assignments do not contain any provision regarding the jurisdiction of any particular court to determine disputes between the parties. The 1979 assignment was executed in New Jersey, USA. The 1986 assignment was executed in Maine, USA. Patzelt Affidavit, para. 13 and Exhibit "K"

[16] ***D. The Parties' Dispute:*** Huhtamaki gave notice of termination of the 1957 Agreement as of October 22, 2007. Prior to and since that time, representatives of CKF and Huhtamaki have met in various locations including De Soto, Kansas (October, 2006), Toronto (October, 2007), and Detroit (August, 2008).

Patzelt Affidavit, para. 19; Dunn Affidavit, Exhibit "H".

[17] By letter dated June 16, 2008 (sent by Huhtamaki Americas, Inc.), Huhtamaki issued demands in respect of both the 1957 and 1978 Agreements. Huhtamaki demanded "post-termination" royalties under the 1957 Agreement for alleged use of "new" technologies. Huhtamaki also purported to declare CKF in "default" under the 1978 Agreement and demanded that CKF discontinue use of trade-marks in CKF's Family of CHINET Trade-marks. The letter stated that all necessary "actions" would be taken by Huhtamaki without any distinction between the 1957 and 1978 Agreements.

Patzelt Affidavit, para. 14 and Exhibit "L"

[18] By letter dated July 15, 2008 (also sent to Huhtamaki Americas, Inc.), CKF rejected all of the demands of Huhtamaki related to the 1957 and 1978 Agreements. It is the position of CKF that the 1957 Agreement has had no recent application to the relationship between the parties and that no royalties are owed to Huhtamaki for any alleged "new" technologies. It is also the position of CKF that the 1978 Agreement cannot be relied upon by Huhtamaki in the face of the parties'

dealings over the last three decades and CKF's unconditional ownership of the Family of CHINET Trade-marks in Canada.

Patzelt Affidavit, para. 15 and Exhibit "M"

[19] By virtue of these demands and in accordance with the proceedings commenced by Huhtamaki in Ontario and Maine (as discussed below), Huhtamaki seeks to enter the Canadian marketplace to sell products, employ technologies, and use trade-marks contrary to the rights and interests asserted by CKF in Canada. As discussed in Part III below, CKF's position is that the parties' dispute pertains to a common factual matrix involving a series of agreements and dealings affecting a common marketplace of products, technologies, and trade-marks.

[20] *E. CKF's Action in Nova Scotia:* On July 14, 2008, CKF commenced the within action against Huhtamaki Americas, Inc. On August 14, 2008, CKF amended its Statement of Claim to include Huhtamaki Company Manufacturing as a co-Defendant.

[21] CKF seeks declaratory and injunctive relief as well as damages for Huhtamaki's unlawful conduct vis-à-vis the 1957 and 1978 Agreements and CKF's

Products, CKF's Technologies, and CKF's Family of CHINET Trade-marks in Canada (all as defined in the Statement of Claim). In particular, CKF rejects the claims and demands made by Huhtamaki to enter the Canadian marketplace on the basis that:

(i) CKF's Products are made from technologies owned by CKF ("*CKF's Technologies*") that have been in use since at least as early as 1969;

(ii) CKF disputes that any technologies employed in the manufacture of CKF's Products constitute alleged "New Know-How" owned by Huhtamaki;

(iii) CKF has acquired exclusive rights to market and sell molded pulp products (and related manufacturing technologies) in the Canadian marketplace;

(iv) CKF denies that it has any obligation to allow Huhtamaki to use any trade-mark in CKF's Family of CHINET Trade-marks in Canada;

(v) CKF is the unconditional owner of CKF's Family of CHINET Trade-marks (including registered and unregistered trade-marks) and all related Products and Technologies in Canada;

(vi) Huhtamaki has no authorization, license, or consent from CKF to enter the Canadian marketplace as demanded and claimed by Huhtamaki;

(vii) Huhtamaki has no post-termination rights under the 1957 Agreement and no entitlement to any royalties from CKF; and

(viii) Huhtamaki is estopped from relying on the 1978 Agreement by virtue of the parties' conduct and dealings over 30 years.

CKF Amended Statement of Claim dated August 14, 2008.

[22] On September 22, 2008, Huhtamaki filed the within Interlocutory Application. No Demand for Particulars or Defence has been filed by Huhtamaki.

[23] ***F. Huhtamaki's Complaint in Maine:*** On August 8, 2008, Huhtamaki Company Manufacturing commenced an action against CKF in the United States District Court for the District of Maine ("***Maine Court***").

[24] Huhtamaki Company Manufacturing alleges in its Complaint that the 1957 Agreement was terminated in October, 2007 and that CKF is using unspecified and unidentified "New Know-How" in violation of the 1957 Agreement. The Complaint further alleges that CKF's use compromises ***the ability of Huhtamaki Company Manufacturing to use the New Know-How in Canada.*** The Complaint seeks damages in excess of \$75,000 on claims of breach of contract, unjust enrichment, and misappropriation of trade secrets. Huhtamaki Company

Manufacturing Complaint filed August 8, 2008, Patzelt Affidavit, Exhibit "P", paras. 27, 45.

[25] On September 22, 2008, CKF filed a motion to dismiss the Complaint in the Maine Court on the grounds of *forum non conveniens*. On November 20, 2008, US Magistrate Judge Kravchuk recommended that the Maine Court deny CKF's dismissal motion on the basis that the burdens placed on CKF in Maine were not sufficiently "oppressive" (the "***Maine Decision***").<sup>2</sup> In so recommending, the Magistrate Judge also commented on the adequacy, convenience, and practicality of the Nova Scotia forum:

The parties do not dispute that the Supreme Court of Nova Scotia is fully "adequate" to resolve the legal dispute between the parties. The only dispute is whether the interests at stake weigh so powerfully in favor of that forum as to justify the dismissal of this action. ***My assessment is that the Supreme Court of Nova Scotia offers a more practical and convenient forum***, but that CKF's showing is simply not strong enough to support a finding of "oppressive" conditions or any significant administrative or legal problems with proceeding in this forum.

...

CKF argues that it would be more efficient and convenient for it to litigate this dispute in Nova Scotia because its primary plant and personnel are located in Nova Scotia and because

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<sup>2</sup> However, Ckf's motion to stay issuance of a scheduling order was granted by the Maine Court, pending final disposition of CKF's motion to dismiss. See *Maine Decision*, p. 1.

there may be third-party witnesses in Nova Scotia who could not be required to appear in Maine or who would have to be transported to Maine at significant expense. ... ***I agree with CKF that litigation in this forum imposes inefficiencies and burdens on it that outweigh the convenience that litigation in this forum provides to Huhtamaki***, but these burdens are not so great that they could fairly be regarded as oppressive.  
[emphasis added]

Huhtamaki Company Manufacturing v. CKF Inc., Recommended Decision on Motion to Dismiss and Order on Ancillary Motions of US Magistrate Judge Kravchuk, Case No. 1:08-CV-264-JAW (D. Me. November 20, 2008), pp. 6-7

[26] The recommended decision of the Magistrate Judge was affirmed by the U.S. District Court, District of Maine on January 12, 2009.

[27] ***G. Huhtamaki's Application in Ontario:*** On August 7, 2008, Huhtamaki Company Manufacturing commenced another proceeding (by way of Notice of Application) against CKF in the Ontario Superior Court of Justice (the "***Ontario Court***").

[28] The Notice of Application seeks a ***declaration*** that the 1978 Agreement permits Huhtamaki Company Manufacturing to ***enter the Canadian marketplace to sell its products with the benefit of a royalty-free licence*** for the trade-marks listed in the 1978 Agreement. The Notice of Application alleges that the 1978

Agreement should be interpreted in a manner that would not recognize CKF's unconditional ownership of the Family of CHINET Trade-marks in Canada.

Huhtamaki Company Manufacturing Notice of Application dated August 7, 2008, Patzelt Affidavit, Exhibit "N", para. 1(a).

[29] On September 4, 2008, CKF brought a motion to stay the Ontario proceeding on the basis of, among other things, forum non conveniens. This motion was heard on November 6, 2008 by Master MacLeod of the Ontario Court. On November 28, 2008, by written Endorsement, Master MacLeod granted CKF's motion and stayed the Ontario proceeding (the "*Ontario Decision*").<sup>3</sup> The Ontario Decision concluded as follows:

[38] In conclusion, while this court has jurisdiction *simpliciter* there is little if any natural connection between this dispute and Ontario, there is no juridical advantage in Ontario that is not equally available in Nova Scotia, the action was commenced in Nova Scotia before the application was commenced in Ontario, the action is more comprehensive and the respondent [CKF] who is *dominus litis* in the Nova Scotia action appears to bear a greater burden of proof. ***If the Nova Scotia action continues then it is appropriate that the [Ontario] application be stayed.*** Either party may move to lift the stay on proper grounds should the Nova Scotia court decline jurisdiction. [emphasis added]

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<sup>3</sup> In staying the Ontario proceeding, Master MacLeod found that: (a) there is no juridical advantage in Ontario; (b) Ontario is not the natural forum for the dispute; (c) the action in Nova Scotia is more comprehensive by seeking rulings on all of the agreements, conduct of the parties, and ownership of Canadian trade-marks; (d) any exercise of jurisdiction by the Maine Court is not determinative; and (e) as between Ontario and Nova Scotia, the latter is more appropriate.



Huhtamaki Company Manufacturing v. CKF Inc., Endorsement (at Case Conference), Court File No. 08-CV-042295 (Ont. Master, November 28, 2008), para. 38.

## ***PART II – ISSUES***

[30] There are two main issues raised by Huhtamaki:

(I) Does CKF's Statement of Claim disclose a reasonable cause of action under Rule 14.25(1)(a)?

(ii) Is Nova Scotia the more appropriate forum to hear this proceeding under the CJPTA?

[31] CKF's position is that both questions should be answered in the affirmative on the basis that Huhtamaki has failed to meet the applicable burden and legal test imposed by case law and legislation.

***PART III—LAW AND ANALYSIS***

[32] ***A. Huhtamaki Does Not Meet Strike Test:*** Huhtamaki's written submissions essentially complain that: (a) the form of CKF's Statement of Claim should be impugned prior to the close of pleadings and in advance of all forms of discovery; and (b) the declaratory relief sought by CKF should be impugned as "hypothetical" or "speculative", notwithstanding the parties' multi-jurisdictional dispute over the 1957 and 1978 Agreements. As detailed below, these complaints by Huhtamaki are fundamentally flawed such that CKF's Statement of Claim should not be struck in whole or in part.

[33] ***1. General Legal Principles—Reasonable Cause of Action:*** Rule 14.25(1)(a) permits an application to strike a pleading for failure to disclose a reasonable cause of action. It is well-established that an applicant seeking to strike a Statement of Claim under Rule 14.25 must meet a heavy burden and satisfy an onerous legal test. Unless the claim is obviously unsustainable, neither the burden nor the test will be met.

[34] As recently stated by the Nova Scotia Court of Appeal in *Sable Mary Seismic Inc. v. Geophysical Service Inc.*, 2007 CarswellNS 559 at para. 24:

*The test to be applied on an application to strike an action is well known. Assuming that the facts pleaded can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Is there a flaw in the claim which can be properly characterized as a "radical defect"?* If it is plain and obvious that the action is certain to fail because it is so fatally flawed, the court may properly strike out those portions of the claim. However, if there is a chance that the plaintiff might succeed, the case should be heard. An order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is obviously unsustainable. ... [emphasis added]

[35] The "plain and obvious" test therefore governs Huhtamaki's application under Rule 14.25(1)(a). General Legal Principles—Availability of Declaratory Relief

[36] **2. General Legal Principles – Availability of Declaratory Relief:** It is trite law that this Court has inherent jurisdiction to grant all remedies necessary to do justice between the parties. Such jurisdiction includes the power to grant declarations. In this regard, s. 41(g) of the *Judicature Act*, R.S.N.S. 1989, c. 240 states:

*41(g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to*

*grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled* to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided; [emphasis added]

[37] In addition to the inherent jurisdiction of this Court, the case law confirms that declaratory relief is specifically available in the context of intellectual property disputes.

[38] For example, in *RIM v. Atari Inc.*, 2007 CanLII 33987 (Ont. S.C.), the Ontario Court dismissed an application to strike a claim for a declaration of non-infringement of copyright. The Court concluded that there was nothing in the *Copyright Act*, R.S.C. 1985, c. C-42 that specifically abrogated the general power of the Court to grant the declaratory relief sought by the plaintiff. The Court also rejected the argument that the claim for a declaration (as a remedy) was not sufficiently tied to the rights being asserted by the plaintiff. Rather, unless the rights were proven by the plaintiff, no declaration would be granted.

[39] Further, in *Sullivan Entertainment Inc. v. Anne of Green Gables Licensing Authority*, 2000 CanLII 16445 (F.C.), the Federal Court considered a claim for a declaration of non-entitlement to benefits under the *Trade-marks Act*, R.S.C. 1985, C. T-13. Relying on its governing statute and rules, the Court concluded that it had the power to grant declaratory relief and the novel claim was not "plain and obvious" to fail. Accordingly, the claim for a declaration simpliciter was well within the bounds of the Court's jurisdiction.

[40] Along the same lines, in *Astral Media Radio Inc. v. SOCAN*, 2008 CarswellNat 3865 (F.C.), the Federal Court considered a claim for declaratory relief relating to certain regulations authorized by the *Copyright Act*. The Court concluded that it clearly had jurisdiction over the subject matter of the action and was empowered to grant declaratory relief as well. Moreover, the Court rejected the defendants' argument that a declaration should not be granted as it would determine a "theoretical, abstract or academic question". Rather, the Court found, at para. 47, that a declaration was available as it would have a "*practical effect on the matters in dispute between the parties*" and would represent the "*first necessary step towards a resolution of the parties' disputes*". [emphasis added]

[41] **3. *Application to the Facts:*** Regarding the form of CKF's Statement of Claim, none of the matters raised by Huhtamaki demonstrates that the action is "plain and obvious" to fail. Rather, the complaints of Huhtamaki are in effect attempts to raise premature and unfounded issues at this stage of the proceeding.

In particular:

- (I) Should Huhtamaki wish to seek particulars of the allegations in the Statement of Claim, Huhtamaki can file a Demand for Particulars to which CKF can respond, all in accordance with the Rules;
- (ii) Should Huhtamaki disagree with any point of law raised by CKF in the Statement of Claim (as permitted by Rule 14.05), Huhtamaki can address the point(s) in its Defence;
- (iii) Should Huhtamaki agree with any of the allegations in the Statement of Claim, Huhtamaki can admit same in its Defence;
- (iv) Should Huhtamaki have no knowledge of any of the allegations in the Statement of Claim, Huhtamaki can address this position in its Defence; and
- (v) Should Huhtamaki dispute any factual or legal characterization of the parties' dealings and / or agreements as asserted in the Statement of Claim, Huhtamaki can respond to same in its Defence.

[42] Moreover, Huhtamaki's own pleadings before the Maine Court (Complaint) and Ontario Court (Notice of Application) do not meet the alleged standards sought to be imposed on CKF. This is apparent from the manner in which Huhtamaki has

claimed a bare trade-mark licence (with unspecified terms / conditions) in the Ontario proceeding.<sup>4</sup> Similarly, Huhtamaki's Complaint in the Maine proceeding fails to identify or specify the alleged "New Know-How" for which post-termination rights are claimed by Huhtamaki under the 1957 Agreement.<sup>5</sup>

[43] Regarding the declaratory relief sought by CKF, Huhtamaki has similarly failed to show any basis for striking the Statement of Claim in whole or in part. In particular, Huhtamaki's position is based on a fundamental misassumption regarding CKF's Technologies: *CKF only asserts pre-1969 technologies in the manufacture of molded pulp products because CKF disputes the existence of any post-1969 "New Know-How"*. This position is apparent from the pleadings and proceedings to date, including:

(i) the definition of "CKF's Technologies" in the Statement of Claim;

(ii) the definition of "CKF's Products" in the Statement of Claim;

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<sup>4</sup> See Notice of Application filed by Huhtamaki Company Manufacturing in the Ontario proceeding which claims, at para. 1(a), that "huhtamaki is entitled to enter the Canadian marketplace to see its products with the benefit of a royalty-free license and to use any of the Canadian trademarks listed in the [1978] Agreement". Patzelt Affidavit, Exhibit "N".

<sup>5</sup> See Complaint filed by Huhtamaki Company Manufacturing in the Maine proceeding which describes "New Know-How", at para. 27, as "technical information and trade secrets of Huhtamaki". Patzelt Affidavit, Exhibit "P".

(iii) CKF's rejection of all of Huhtamaki's demands related to alleged use of "New Know-How" and the incorporation-by-reference of this position in the Statement of Claim;

(iv) CKF's refusal to pay for alleged "post-termination" royalties under the 1957 Agreement and the incorporation-by-reference of this position in the Statement of Claim; and

(v) the nature and scope of relief sought against Huhtamaki in the Statement of Claim.

[44] In addition, this Court has the jurisdiction to grant the declaratory relief sought by CKF for a number of reasons.

[45] First, it is within the inherent jurisdiction of this Court to award a declaration to CKF should CKF prove its intellectual property rights in respect of the CKF Technologies, CKF Products, and CKF Family of CHINET Trade-marks. Other courts have similarly recognized and enforced such jurisdiction.

[46] Second, contrary to Huhtamaki's submissions, CKF's declaration does not address a purely "hypothetical" or "speculative" question. Rather, there is an actual dispute between the parties as to whether or not Huhtamaki should be prevented from entering the Canadian marketplace. The practical and necessary



effect of the declaration sought by CKF would be to determine this dispute. As such, unless Huhtamaki were to permanently abandon its request to enter the Canadian marketplace, CKF's declaratory relief is well-founded.<sup>6</sup>

[47] Third, Huhtamaki itself seeks declaratory relief against CKF in respect of the 1978 Agreement, as set out in the Notice of Application filed by Huhtamaki in Ontario.

[48] Fourth, CKF's allegation that Huhtamaki is estopped from relying on the 1978 Agreement is in direct response (defence) to Huhtamaki's demand for a royalty-free licence under the 1978 Agreement. Once again, unless Huhtamaki were to permanently abandon its request for a licence under the 1978 Agreement, CKF's allegation of estoppel remains well-founded. Moreover, the estoppel allegation is based on CKF's underlying trade-mark rights in Canada, as asserted in the Statement of Claim and to be proven by CKF.

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<sup>6</sup> In the Ontario Decision, Master MacLeod described the dispute between the parties at para. 19:

It is the wish of Huhtamaki to enter the Canadian market that has triggered the dispute between the parties. Specifically Huhtamaki wishes to sell Chinet products in Canada. In particular, Huhtamaki wished to sell Chinet branded plastic plates through Costco outlets and perhaps Wal-Mart. It has been doing so successfully in the United States but entry into the Canadian market has been blocked by the respondent [CKF] which asserts that it has exclusive rights to use of the Chinet brand name in this country.

[49] ***B. Nova Scotia is the More Appropriate Forum:*** Huhtamaki's arguments under the CJPTA are based on two erroneous assumptions: (a) that the issues in respect of the 1957 and 1978 Agreements are "completely severable" and "have nothing in common" other than the parties involved; and (b) that section 13 of the 1957 Agreement is an exclusive forum selection clause in favour of the Maine Court. As detailed below, CKF disputes these assumptions.<sup>7</sup> In particular, there is a common factual matrix underlying the parties' dispute over technologies and trade-marks such that all issues are best determined in a comprehensive action such as the one at bar. In addition, CKF's expert evidence on the meaning of section 13 of the 1957 Agreement is contrary to Huhtamaki's interpretation of the clause. CKF's position is that section 13 is merely permissive (or non-exclusive) vis-à-vis the jurisdiction of Maine. As such, this Court is not precluded from exercising jurisdiction under the CJPTA.

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<sup>7</sup> In addition, CKF rejects the new position put forward by Huhtamaki that CKF's action in Nova Scotia is tantamount to an "anti-suit injunction". There is no reference to such a position in Huhtamaki's Interlocutory Notice and, in any event, there is no merit to this position. An anti-suit injunction seeks to prohibit a litigant from commencing suit in another jurisdiction. The issue to be decided by this Court is not the entitlement of Huhtamaki to sue in the first place but rather the appropriate forum in which extant litigation should continue.

[50] CKF accepts Huhtamaki's admission that this Court has territorial competence under s. 11 of the CJPTA. However, CKF disagrees with Huhtamaki's interpretation of s. 12 of the CJPTA and the proposed balancing of factors under that legislation. CKF's position is that the balancing of factors under the CJPTA leads to the conclusion that *Nova Scotia* — not Maine or Ontario — *is* the more appropriate jurisdiction to hear this matter.

[51] *1. Overview of CJPTA in Nova Scotia:* The CJPTA was proclaimed into force on June 1, 2008. The legislation is modelled on the Uniform Court Jurisdiction and Proceedings Transfer Act (Uniform Law Conference of Canada). The CJPTA covers a number of subjects including territorial competence of the courts of Nova Scotia.

[52] Section 11 of the CJPTA sets out a number of circumstances where a "real and substantial" connection is presumed to exist between Nova Scotia and the facts of a particular proceeding. These include circumstances where a proceeding:

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in the Province;

...

(h) concerns a business carried on in the Province;

(I) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in the Province, or

(ii) in relation to immovable or movable property in the Province;

...

[53] Section 12 of the CJPTA sets out the circumstances in which a Nova Scotia Court may decline to exercise its territorial competence, namely, on the "ground that a court of another state is a more appropriate forum in which to hear the proceeding". In deciding this question, the Court 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.<sup>8</sup>

[54] **2. Jurisprudence in Other Provinces:** The CJPTA has not yet been considered in a reported decision of this Court. However, similar legislation has been enacted and judicially considered in British Columbia and Saskatchewan. Set out below is a discussion of several cases relevant to this proceeding.

[55] In *Lloyd's Underwriters v. Cominco Ltd.*, 2007 CarswellBC 864, leave to appeal to S.C.C. granted [2007] S.C.C.A. No. 322, the British Columbia Court of Appeal concluded that B.C. was a more appropriate forum to hear a dispute related to alleged contamination of a river in B.C. that accumulated in Washington. Parallel proceedings were commenced in both jurisdictions and the United States District Court for the Eastern District of Washington was the first court to assert

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<sup>8</sup> The rationale for s. 12 of the CJPTA was explained in the model *Uniform Court Jurisdiction and Proceedings Transfer Act*:

Section [12] is meant to codify the doctrine of forum non conveniens, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia* (1993). The language of subsection [12(1)] is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection [12(2)] are relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past.

The discretion in section [12] to decline the exercise of territorial competence is defined without reference to whether a defendant was served in the enacting jurisdiction or ex juris. This is consistent with the approach in part [1] as a whole, which renders the place of service irrelevant to the substantive rules of jurisdiction. ...

jurisdiction. Nonetheless, the balancing of factors under the B.C. CJPTA still led to the conclusion that British Columbia was the more appropriate forum to hear the proceeding commenced in that province. In particular, the B.C. Court of Appeal rejected, at para. 67, a "simplistic approach that defers to the first court to assert jurisdiction". Further, in concluding that British Columbia had the closest and most substantial connection with the action, Newbury J.A. wrote, at para. 74:

*I do not regard such a conclusion as 'disrespectful' to the foreign court, or as negating the principle of comity—a principle based on mutual respect and on "justice, necessity and convenience".* [emphasis added]

[56] In *Purple Echo Productions Inc. v. KCTS Television*, 2008 CarswellBC 337 (C.A.), the British Columbia Court of Appeal considered another case involving the jurisdictions of B.C. and Washington State. The dispute involved a U.S. broadcaster who entered into an agreement to promote and broadcast a B.C. television series for which signals were received in the province. The producer started a claim in B.C. and the broadcaster applied under the B.C. CJPTA for a stay of action. The Court of Appeal rejected the application on the basis that the

broadcaster failed to demonstrate clearly that Washington was the more appropriate forum.<sup>9</sup>

[57] In *Fujitsu Consulting (Canada) Inc. v. Themis Program Management & Consulting Ltd.*, 2007 CarswellBC 2137 (S.C.), the British Columbia Court considered the appropriate forum (Ontario or B.C.) to hear a contractual dispute involving work performed for the Ontario government. In doing so, the Court considered both the B.C. CJPTA and the decision of the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 ("Pompey"). The Pompey case stands for the proposition that in the face of a foreign exclusive jurisdiction clause, a domestic plaintiff must show "strong cause" why a stay of proceedings should not be granted.

[58] The B.C. Court stated that the starting point for any application of the Pompey case is to determine whether the contract in question contains: (a) an

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<sup>9</sup> See also *Columbia Pictures Industries v. Wang*, 2007 CarswellSask 648 (C.A.) Which was decided under the Saskatchewan CJPTA. An action was brought in Saskatchewan by a California-based company against a Saskatchewan resident and a New York-based company. The action sought to enforce contractual, motion picture rights in relation to literary works subject to copyright in Canada. Weighing all of the factors under the Saskatchewan CJPTA, the Court of Appeal concluded that California was *not* the more appropriate forum. Any issue of California law could be proven in Saskatchewan and a separate California proceeding between two of the parties had been stayed. The circumstances surrounding the contractual dispute were also more appropriately tried in Saskatchewan.

exclusive forum selection clause; or (b) a non-exclusive attornment clause. If the latter exists, the "strong cause" test should not be applied. In *Fujitsu Consulting (Canada) Inc. v. Themis Program Management & Consulting Ltd.*, supra, the contractual clause (exclusive as to B.C.) and the balancing of factors under the B.C. CJPTA led to the conclusion that B.C. (not Ontario) was the appropriate forum to hear the dispute.<sup>10</sup>

[59] **3. Application to the Facts:** Before discussing the weighing of factors under s. 12 of the CJPTA, it is necessary to address some preliminary matters arising from the evidence and Huhtamaki's written submissions.

[60] First and foremost, the issues in respect of the 1957 and 1978 Agreements are "completely severable" and "have nothing in common" other than the parties involved. I agree with this position. As set out in the Statement of Claim and confirmed by the evidence filed by the parties, the issues raised in respect of

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<sup>10</sup> However, even in the face of an exclusive forum selection clause, the courts may not enforce the clause if it only applies to certain parties or portions of a dispute. See *Skyway Canada Ltd. v. Clara Industrial Services Ltd.*, 2005 CarswellOnt 5060 at paras. 22-26 (Master) and Ontario Decision, para. 36.

The post-*Pompey* decisions of the B.C. and Ontario Courts can also be read consistently with the earlier decision of the Nova Scotia Court of Appeal in *Maritime Telegraph & Telephone Co. v. Pre Print Inc.*, 1996 CarswellNS 12 (C.A.) (where the parties conceded the issue of concurrent versus exclusive jurisdiction and the Court refused to grant a stay of the Nova Scotia action). In particular, the approaches of the B.C. and Ontario Courts can be characterized as further developments in the case law in the post-*Pompey* era.



"Know-How" on the one hand and CHINET-related trade-marks on the other do not exist in factual / legal silos. Rather, the issues pertain to a common factual matrix consisting of the same historical relationship between the parties, the same business / operational context, the same (or similar) molded pulp products, the same Canadian marketplace, etc.

[61] Second, CKF denies that section 13 of the 1957 Agreement is an exclusive forum selection clause in favour of the jurisdiction of Maine. In this regard, CKF and Huhtamaki have filed conflicting expert evidence. CKF's expert, Howard Dana (formerly an Associated Justice of the Supreme Judicial Court of Maine), opines that the clause is a permissive one *vis-à-vis* the jurisdiction of Maine. Huhtamaki relies on the opinion of a Maine practitioner, Mr. George Burns, to argue that the clause is a mandatory one *vis-à-vis* the Maine Court. Neither the Maine Decision nor the Ontario Decision determined this issue.

[62] In these circumstances, Huhtamaki has not proven that under Maine law section 13 is an exclusive forum selection clause (as opposed to a non-exclusive attornment clause). The "strong cause" test should therefore not apply to CKF. In any event, even if the clause were exclusive *vis-à-vis* the jurisdiction of Maine, it is

apparent that the clause would not apply to all of the matters in dispute between the parties. On this basis, the clause should still not be enforced against CKF.<sup>11</sup>

[63] Rather, the circumstances relevant to this action are set out in s. 12(2) of the CJPTA. These circumstances are weighed below and lead to the conclusion that Nova Scotia is the more appropriate forum to hear this proceeding.

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

[64] CKF is based in Nova Scotia where CKF's Products are made and CKF's Technologies are used at its primary plant in Hantsport. There are more CKF employees located in Nova Scotia than in any other province of Canada. Most of CKF's officers are residents of Nova Scotia, including the Chairman, CEO & President. Most of CKF's anticipated witnesses reside in Nova Scotia with the exception of one in Ontario. None of CKF's witnesses resides in Maine. The principal fact witness put forward by CKF on this application is a resident of Nova Scotia.

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<sup>11</sup> In any event, even if section 13 were enforced against CKF and the common law factors under the “strong cause” test applied, these would overlap with the statutory factors under the CJPTA, thereby leading to the same conclusion – i.e. Nova Scotia is the more appropriate forum to hear this proceeding. See *Fujitsu Consulting (Canada) Inc. v. Themis Program Management & Consulting Ltd.*, supra at paras. 31-35.

[65] Huhtamaki's corporate offices are located in Kansas. Both Huhtamaki entities are Delaware companies. Huhtamaki Company Manufacturing has a manufacturing facility in Maine (along with facilities throughout the United States). Specific witnesses for Huhtamaki have been identified in Kansas and general personnel witnesses have been identified in Maine. No Huhtamaki witness has been identified as a resident of Ontario. The principal fact witness put forward by Huhtamaki on this application is the companies' President from Kansas.

[66] Overall, the relative convenience of the Nova Scotia forum is greater than that of the Maine or Ontario forum.<sup>12</sup>

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

[67] Huhtamaki's position is that Maine law applies to the 1957 Agreement by virtue of section 13 of that Agreement. However, CKF's position, as set out in the Statement of Claim, is that the 1957 Agreement has had no recent application to the relationship between the parties. In any event, as demonstrated by the filing of

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<sup>12</sup> This conclusion is also consistent with the findings of convenience / practicality made in the Maine and Ontario Decisions.

the parties' expert affidavits, any applicable issues of foreign law could be adequately addressed by the Nova Scotia Court.

[68] There are no governing law provisions in the 1978 Agreement or subsequent trade-mark assignments of 1979 and 1986.

[69] CKF pleads and relies upon the Trade-marks Act in the Statement of Claim.

[70] Huhtamaki pleads and relies upon the Maine Uniform Trade Secrets Act in the Maine Complaint.

[71] On balance, this factor is still in favour of Nova Scotia.

(c) the desirability of avoiding multiplicity of legal proceedings

[72] Proceedings between CKF and Huhtamaki were started in Nova Scotia (first in time) followed by Ontario and Maine. The Maine Decision has asserted jurisdiction over the dispute in Maine (in respect of the 1957 Agreement) while the Ontario Decision has stayed the Ontario proceeding (in respect of the 1978

Agreement). This Court will be the third jurisdiction to hear the *forum non conveniens* arguments of the parties.

[73] Against this procedural backdrop, the greatest chance of avoiding (or minimizing) a multiplicity of proceedings is for this Court to exercise jurisdiction in Nova Scotia. This is the only way that ***all*** of the issues between ***all*** the parties could potentially be resolved in a single proceeding in a single jurisdiction.

[74] By contrast, Huhtamaki's position ensures the greatest likelihood of multiple proceedings in different jurisdictions. This follows from the relief apparently sought by Huhtamaki, namely, to transfer the proceeding to the Maine Court (in respect of the 1957 Agreement) ***and*** the Ontario Court (in respect of the 1978 Agreement). Huhtamaki does not address the remaining parts of the Nova Scotia proceeding such as CKF's allegation of estoppel and assertion of ownership of unregistered trade-marks related to the sale of CKF's Products in Canada.

Presumably, Huhtamaki acknowledges that these remaining parts would have to be adjudicated in Nova Scotia. It follows that Huhtamaki's Application, if granted, would maximize the likelihood of three parallel proceedings in three jurisdictions.

[75] Further, the Maine Decision (as the first court to assert jurisdiction) is not determinative in this case. Rather, this Court would not violate any principles of comity by concluding that the balancing of factors under the CJPTA favours Nova Scotia. Moreover, such a conclusion is entirely consistent with the comments made by Master MacLeod in the Ontario Decision, at para. 35, in connection with the Maine proceeding:

...Whether or not Maine retains jurisdiction is not a factor that predisposes this court to exercise jurisdiction. *There may have to be parallel proceedings in two jurisdictions but there is surely no need for three.* [emphasis added]

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

[76] Once again, the greatest chance of avoiding (or at least minimizing) the risk of conflicting decisions by different courts is for this Court to exercise jurisdiction in Nova Scotia. This would ensure that at least one court (i.e. Nova Scotia) has the opportunity to consider *all* of the evidence pertaining to *all* of the matters in dispute between the parties.

[77] By contrast, Huhtamaki's position maximizes the risk of conflicting decisions. In particular, Huhtamaki seeks to artificially split the issues in dispute

and ensure that different courts will have access to different evidence pertaining to only some of the matters in dispute.

- (e) the enforcement of an eventual judgment

[78] CKF has chosen to bring this action in Nova Scotia where it is principally based. There is no doubt that, if judgment is obtained against Huhtamaki, it will be enforceable in Nova Scotia. Since the relief sought by CKF only applies to the Canadian marketplace, CKF will not have to enforce any Nova Scotia judgment outside of Canada.

[79] Whether any non-monetary relief obtained by Huhtamaki in Maine would be enforceable in Canada is disputed by the parties based on their respective interpretations of *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52.

[80] In that case, a majority of the Supreme Court of Canada (per Deschamps J.) decided against Pro Swing by refusing to enforce in the Ontario Superior Court of Justice a consent decree and contempt order issued by the United States District Court for the District of Ohio. By contrast, a minority of the Court (per McLachlin C.J.) would have permitted the exercise of the Court's equitable jurisdiction in

favour of Pro Swing. In the result, a majority of the Court held that a foreign, non-monetary judgment issued in Ohio was not enforceable under Canadian law. At the same time, the majority and minority agreed that there was a need to change the common law preventing the enforcement of foreign, non-money judgments. However, the precise circumstances and legal conditions necessary to apply this change remain unclear. On this basis, there is an issue of enforceability *vis-à-vis* any non-money judgment obtained by Huhtamaki in Maine.

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

[81] Neither CKF nor Huhtamaki has presented any evidence to show that there would be a juridical advantage or disadvantage to proceeding in Nova Scotia.

[82] In summary, the factors under s. 12(2) of the CJPTA lead to the conclusion that Nova Scotia is the forum with the closest and most natural connection to all of the matters in dispute. This conclusion is also consistent with the views expressed in the Ontario and Maine Decisions regarding the Nova Scotia forum. In the result, Huhtamaki has not shown clearly that the Maine and Ontario Courts are the more appropriate fora in which to hear this proceeding.



[83] **Conclusion:** I am therefore dismissing the application. The Plaintiff/Respondent shall have its costs in the amount of \$1,500.00 payable forthwith in any event.

Order accordingly.

J.