SUPREME COURT OF NOVA SCOTIA

Citation: McDermott Gulf Operating Company v. Oceanographia Sociedad Anonima de Capital Variable, 2010 NSSC 118

Date: 20100331
Docket: Hfx 09-309795
Registry: Halifax

Between:

McDermott Gulf Operating Company Inc. and
Secunda Marine Services

Plaintiffs/Respondents

v.

Oceanographia Sociedad Anonima de Capital Variable,

Defendant/Applicant

- and -

Con-Dive, L.L.C. and Amado Yanez

Defendants

Judge: The Honourable Justice Patrick J. Duncan

Heard: September 17, 2009, in Halifax, Nova Scotia

Counsel: Wylie Spicer Q.C. , for the Plaintiffs/ Respondents
Richard Southcott and Scott R. Campbell, for the defendant/ applicant OSA
Matt Williams, for the defendant Con-Dive LLC
Amado Yanez, defendant, not represented and not present

By the Court:

INTRODUCTION

[1] The plaintiff McDermott Gulf Operating Inc. (McDermott) claims from the defendants pursuant to the provisions of the Supplytime 89 Charter Party (the Charter Party) dated August 10, 2006, originally entered into between Secunda Global International Inc. (Secunda Global) and Con-Dive LLC, (Con-Dive). McDermott succeeded to the rights and obligations of Secunda Global in the Charter Party. Secunda Marine Services managed the Charter Party for McDermott.

[2] The defendant Oceanografia Sociedad Anonima de Capital Variable (OSA) moves to stay or dismiss the action as against it on the basis that a Nova Scotia court lacks territorial competence (jurisdiction *simpliciter*) over it in this proceeding. They submit, alternatively, that even if the Nova Scotia Supreme Court has territorial competence over it in this proceeding, the court should decline to exercise such jurisdiction because there is a more appropriate forum (*forum conveniens*) for the plaintiffs' action against OSA.

FACTS

Standard of Proof of Jurisdictional Facts

[3] The Statement of Claim in this matter asserts that the defendants are indebted to the plaintiff, as at the time of the filing of the Claim, of an amount as Charter hire totaling US $5,020,522.80, together with other charges incurred and owing under various provisions of the Charter Party.

[4] I am urged by the plaintiffs that the court's fact-finding role is strictly limited by the preliminary nature of the motion and moreover, that the standard of proof of jurisdictional facts is less than on a balance of probabilities. The plaintiffs submit that the facts as alleged in the Statement of Claim should be taken at face value and that where there are two competing versions of facts, as has been suggested exists in the matter before me, the plaintiffs' version should be accepted for the purposes of determining jurisdiction and the *forum conveniens,* provided there is a reasonable basis in the Statement of Claim and affidavit evidence.

[5] In support of this proposition, I have been referred to the decision of the Ontario Court of Appeal in *Incorporated Broadcasters Ltd. v. CanWest Global Communications Corporation* (2003)169 O.A.C. 1, at paragraphs 53-58. The essential point I take from the referenced passage is that a court should not attempt to determine the merits of the claim at this preliminary stage of determining jurisdiction. In the context of that case, the court cautioned that a court in hearing this type of motion should not treat it as a motion for summary judgment or to strike the statement of claim for disclosing no reasonable cause of action.

[6] In *Young v. Tyco International of Canada Ltd.* 2008 ONCA 709, Laskin J.A. writing at paragraphs 31-39 held that:

> 31... the motion judge should adopt a prudential, not an aggressive approach to fact finding... wherever possible the motion judge should not "make findings of fact about fundamental issues in the action that ought to be resolved at the trial." Of course, the motion judge should not determine the merits of the lawsuit... Even beyond that, however, the motion judge should avoid drawing conclusions or making findings on important factual or legal disputes relating to the merits.
>
> ...
>
> 33... On these motions, the motion judge will have no choice but to address the competing versions put forward by the parties. In doing so, the motion judge should accept the plaintiff's version as long as it has a reasonable basis in the record. ...

> 34... the important point is that at this preliminary stage of the action, the motion judge's assessment and weighing of the *forum non conveniens* factors should be based on the plaintiff's claim if it has a reasonable basis in the record, not on the defendant's defense to that claim.

[7] I have considered the position advanced by the plaintiff and accept these statements of the Ontario Court of Appeal as the correct standard to apply to fact-finding in the consideration of this motion.

The parties

[8] The plaintiff, McDermott, is a body corporate incorporated under the laws of Panama and is the owner of the M/V Bold Endurance (the vessel), which vessel sails under the flag of Barbados. The plaintiff, Secunda Marine Services, is the business name registered for J. Ray McDermott Canada Ltd., a Nova Scotia body corporate, and is the manager of the Supplytime 89 charter.

[9] The defendant, Con-Dive, is a Louisiana body corporate carrying on business in the offshore industry. Wesley Freeman was the owner of Con-Dive and signed on its behalf when it entered into the Charter Party in 2006.

[10] The defendant OSA is a Mexican body corporate created in 1968. It engages in the business of providing vessels, equipment, personnel and expertise to the offshore oil industry.

[11] The defendant, Amado Yanez, also referred to as Amado Yanez Osuna, (Yanez) , is an individual with Mexican citizenship. He purchased Con-Dive in January 2008, and is also a part owner and Director General of OSA.

The Charter Party

[12] On August 10, 2006 Global Secunda of Barabados entered into the Charter Party with Con-Dive. The agreement called for the vessel to be delivered on October 1, 2006 to a mutually agreeable United States port on the Gulf of Mexico. The period of hire was to terminate after two years i.e., October 2008, with a one year option to extend.

[13] The vessel's area of operation was specified to be the "United States, Gulf of Mexico and the Caribbean Sea". In a written amendment to the Charter dated

September 5, 2007, this clause was deleted and the area of operation was left undefined except to the extent that it was not permitted to operate in the territorial waters of the United States. In fact, the vessel operations that are the subject of this proceeding are alleged to have occurred entirely in the territorial waters of Mexico.

[14] The Charter permits the "subletting, assigning or loaning of the vessel" subject to the Owners' prior approval which was not to be unreasonably withheld. (Clause 17)

[15] In the event of "any dispute" with respect to the Charter Party, it was agreed:

> 31 (a) This Charter Party shall be governed and construed in accordance with the Laws of Nova Scotia and the Federal Laws of Canada applicable thereto with any disputes resolved in the Supreme Court of Nova Scotia or the Federal Court of Canada in Halifax, and both Charterers and Owners unconditionally agree to submit to the jurisdiction of these Courts.
>
> ...
>
> 32 This is the entire agreement of the parties, which supersedes all previous written or oral understandings and which may not be modified <u>except by a written amendment</u> signed by both parties. (emphasis added)

[16] The Charter Party required that Con-Dive's performance of its obligations under the Charter Party be secured by a limited guarantee in the amount of US $1,800,000. Annex "C" to the Charter Party is a letter from OSA under the signature of its' Director General, Amado Yanez Osuna, committing to act as the guarantor. The requirement for the guarantee described OSA as an "affiliate company" of Con-Dive.

History of the Charter Party

[17] On or about July 24, 2007, Secunda was requested to, and did, execute a letter directed to the Mexican national oil company, "Pemex", confirming to Pemex that the vessel was exclusively available to OSA for use in completing a proposed contract for work in relation to marine pipelines located in the Gulf of Mexico.

[18] At or near the same time, OSA obtained a "Navigation Permit" from the Mexican government which allowed the vessel to operate within Mexican

territorial waters. Paragraph III of the Permit states that OSA certified to the government:

> (b) That the vessel with which it shall render the service complies with the Maritime safety requirements for navigation and is under its legitimate possession through a Time Charter Contract which it executed with the company Secunda Global International Inc. (emphasis added)

[19] Con-Dive supplied the vessel to OSA in support of OSA's performance of the pipeline construction and repair contract for Pemex. In fact, the vessel was used by OSA throughout the Charter Party term.

[20] By January of 2008 Con-Dive was defaulting in its obligations to pay for provisioning of the vessel and so McDermott paid an invoice in the amount of $21,000 to the Florida based supplier. This coincides chronologically with Yanez' acquiring Con-Dive.

[21] There was a further written Amendment (No. 2) dated June 25, 2008, which extended the Charter Party to March 31, 2009. The evidence is that it was signed by "R. Clayton Etheridge", "for Amado Yanez Osuna" on behalf of "Charterer Con-Dive LLC". Mr. Etheridge was the Operations Manager for OSA. On the

face of it, the extension was granted to Con-Dive, notwithstanding that it was being executed by persons who had an interest in and/or a management function with OSA, the company that was actually using the vessel.

[22] From July of 2008 onward, the corporate lines between Con-Dive and OSA became blurred. The evidence of witnesses providing evidence on behalf of the plaintiffs indicates that there were regular exchanges of correspondence throughout the last six months of 2008. All discussions between senior management at Secunda Marine Services concerning the Bold Endurance were held directly with Yanez.

[23] In the latter part of 2008 and in early 2009 difficulties in obtaining payment from Con-Dive caused McDermott to threaten the termination of the Charter Party and retrieval of the vessel. An arrangement was made whereby invoices for December 31, 2008, January 31, 2009 and February 28, 2009 were submitted to OSA and to the attention of Yanez. They went unpaid as did earlier invoices for October and November of 2008.

[24] Shaun Keefe, Senior accountant for Secunda Marine Services has given evidence that his communications pertaining to the overdue accounts were conducted with three representatives of OSA, being Yanez, C.P. Epifanio Salud Ramos, Project Manager, and Juan Carlos Hernandez Villalobos, the Fleet Manager of OSA.

[25] On January 7, 2009, OSA made payment on the account in the amount of US $903,512.68. On the following day, Mr. Keefe received an e-mail from Villalobos indicating that the billing was to go to OSA and invoices should be sent to the attention of Yanez.

[26] Through the months of January and February of 2009 numerous conversations and e-mails were exchanged with respect to the outstanding balance of the account. Subject headings generally referred to "Oceanografia pmt" and e-mail correspondence for communications went to and from OSA e-mail addresses.

[27] On or about February 24, 2009, the plaintiffs prepared and forwarded to Yanez a Third Amendment to the Charter Party, the terms of which would cause OSA to formally assume Con-Dive's position as Charterer under the Charter Party.

This was never executed. The only witness who speaks to this document on behalf of the plaintiff is Donald MacLeod, Vice President and Senior Counsel of the plaintiff Secunda, who, at paragraph 23 of his affidavit, states:

> To formalize this relationship, a Third Amendment to the Charter Party was sent to Mr. Yanez on or about February 24, 2009. The intent of the document was to formalize the relationship that had been ongoing for some time, i.e., OSA had assumed the benefits and rights and obligations under the Charter, and should be formally substituted in place of Con-Dive in the document. In previous discussions I understand, based on information and belief, Mr. Yanez had agreed to this but he never did formally execute the Third Amendment to the Charter Party. (emphasis added)

[28] Mr. MacLeod never states the source of his "information and belief".

[29] Hermillio Escobedo, Commercial Director of OSA swears that neither of OSA nor Con-Dive agreed to the proposed Third Amendment.

[30] I have reviewed the proposed Third Amendment document, attached as exhibit C to the affidavit of Mr. Escobedo. I note that the accompanying e-mail from Dwayne Smithers, Vice President and General Manager of Secunda Marine Services states: "Please find attached extension on the same terms as we previously discussed, however, the company we [sic] now be described as Oceanografia rather than Con Dive. Please sign and return by e-mail." This e-mail

does not suggest that the change of Charterer was previously discussed. At best it is ambiguous. Even on the minimal threshold applicable to the finding of facts in this motion, I cannot conclude that OAS and/or Mr. Yanez stated an intention to execute the document.

[31] In early March, Donald MacLeod, entered into negotiations directly with Yanez to arrange payment of the account. The evidence is that Yanez agreed, in a conference call of March 5, 2009, that OSA would make payment on a schedule that was related to the completion date of OSA's contract work for Pemex. On the basis of his representations, the plaintiffs agreed not to suspend the operation of the M/V Bold Endurance.

[32] In a confirmatory email from MacLeod to Yanez he affirmed that the rights of the owners "at law and under the Charter Party" were reserved.

[33] By letter of March 24, 2009 the plaintiffs sent a demand letter to "Armado Yanez; Con-Dive LLD; c/o Oceanografia SA de CV" seeking payment of the account. It states:

> ... please be aware that, under Clause 38, MGOC is entitled at its sole option to suspend performance of any and all of its obligations under this Charter Party and Con-Dive will remain responsible for payment of any Hire during any suspension of the Vessel while Hire is still outstanding. Please also be aware of that MGOC has the right to withdraw the Vessel should payment not be received in accordance with the terms of the Charter Party and this will serve as notice that the MGOC at its option is entitled to exercise this remedy. (emphasis added)

[34] A deadline was set requiring payment on the following day. On the morning of the 25th, a Mexican based lawyer contacted Mr. MacLeod indicating that he represented OSA and Yanez. He said he was instructed to negotiate an all encompassing settlement of the accounts. An integral part of the intended settlement was to include a setoff of the US $1.8 million deposit that OSA put with Secunda Marine. Further communications were exchanged with the lawyer that day, but no payment was made, and the plaintiffs suspended operation of the vessel.

[35] The US$1,800,000 guarantee was drawn down and exhausted by McDermott.

[36] There is no evidence that Con-Dive assigned its' rights or obligations under the Charter Party to any other person or entity.

[37] In April of 2009, the plaintiffs initiated an action in the state of Alabama, United States of America, as against the three defendants in this action together with two other unrelated defendants who were involved in supplying equipment to the vessel. The Verified Complaint presented to the court by the Attorney for the plaintiffs includes the following paragraph:

> 11. Plaintiff McDermott claims from the defendants pursuant to the provisions of the Supplytime 89 Charter (the "Charter") dated August 10, 2006, originally between Secunda Global International, Inc. and Con-Dive. ....

[38] Later in the complaint amounts are claimed against the defendants on the same basis as are claimed before this Court.

[39] The Verified Complaint sought a lien against the equipment aboard the ship and five specific remedies. Of relevance to this proceeding the plaintiffs sought an order of maritime attachment of the property of the various defendants in that action, and a judgment against all of the defendants for the same amount claimed in this action, and on the same basis.

[40] An order for arrest of the vessel was issued by an Alabama court on April 13, 2009 together with an order directing the issuance of the writ of attachment under certain Admiralty rules.

[41] An order was issued by United States District Judge William H. Steele on or about May 29, 2009 which granted OSA's motion to vacate the arrest of the equipment. The attachment was vacated. No conclusion was reached with respect to the jurisdiction of the court to hear the principle claim.

POSITION OF THE APPLICANT

[42] OSA argues that only one of the defendants , Con-Dive, is privy to the Charter Party which is subject to a choice of law clause and a forum selection clause in favor of Nova Scotia. It says that it has no connection to Nova Scotia and that its' only relationship to the Charter Party is by way of a limited guarantee to one of the plaintiffs, which guarantee has been exhausted. OSA says that it did not become privy to the Charter Party or bound by any of the obligations set out in it.

[43] For these reasons, OSA submits that this court has no territorial competence/jurisdiction *simpliciter* over the plaintiffs' claim against it and that therefore the claim should be dismissed as against it.

[44] Alternatively, OSA submits that the court should decline to exercise its territorial competetence over the claim against OSA and enter a stay of proceedings in favour of a more appropriate forum (*forum conveniens*).

POSITION OF THE RESPONDENT PLAINTIFFS

[45] The plaintiffs submit that by its conduct and representations, OSA agreed to be bound or acted as if they were bound by the provisions of a uniform Time Charter for offshore service vessels under the Charter Party in question. Specifically, the plaintiff says:

i) OSA stepped in to assume the benefits and responsibilities of the charter and/or the use of the vessel;

ii) OSA undertook to pay Charter Hire, directed the operation and control of the vessel and placed personnel aboard the vessel;

iii) Yanez represented and undertook to make payments of Hire from OSA to Secunda Marine Services;

iv) That by his actions, Yanez acknowledged that OSA was a beneficiary of the Charter and therefore was the party responsible as Charterer under the Charter Party.

ANALYSIS

[46] The application has been brought pursuant to **Nova Scotia Civil Procedure Rule** 4.07 which reads:

> Lack of jurisdiction
>
> 4.07 (1) A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.

(2) A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.

(3) A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the defendant may file a notice of defence, and the court may only grant judgment against the defendant after that time.

[47] The substance of this motion is governed by the provisions of the **Court Jurisdiction and Proceedings Transfer Act** 2003 (2nd Sess.), c. 2, s. 1 (**CJPTA**). The provisions of that **Act** which are relevant to this application are:

2 In this Act,

(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. 2003 (2nd Sess.), c. 2, s. 2.

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

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

Proceedings against persons

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

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

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

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

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

(e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based. 2003 (2nd Sess.), c. 2, s. 4.

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;

...

Court may decline territorial competence

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.
> 2003 (2nd Sess.), c. 2, s. 12. (emphasis added)

[48] The Nova Scotia Court of Appeal, in *Bouch v. Penny* 2009 NSCA 80, at paragraph 29, cited with approval the analytical framework adopted by Justice Wright in disposing of this type of application. The relevant provision of his decision is reported at 2008 NSSC 378:

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

> court may then decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action.

[49] The moving party has presented submissions challenging each of the bases for establishing territorial competence in accordance with section 4. For its part, the respondent acknowledges that sections 4 (a), (b) and (d) cannot be relied upon to establish territorial competence on the facts of this case. Instead it focuses its argument on the sections 4 (c) and (e).

*Is there an agreement, within the meaning of section 4(c) of the **CJPTA**, as between the plaintiffs and OSA to the effect that Nova Scotia courts have territorial competence over this matter?*

[50] The applicant says that OSA is not a party, and has never been a party, to any agreement with the plaintiffs by which it agreed to submit to the jurisdiction of the Nova Scotia courts.

[51] The respondent says that OSA, by its conduct and representations, is subject to the provisions of clause 31 of the Charter Party and therefore must be taken to

have expressly agreed that this court has jurisdiction pursuant to section 4 (c) of the **CJPTA.**

[52] There is no evidence to support the conclusion that Con-Dive assigned its position under the Charter Party to OSA.

[53] Clause 32 of the Charter Party stipulates that it was to supersede all previous written or oral understandings and could not be modified "except by a written amendment signed by both parties". There is no evidence of a written amendment formalizing the position of OSA as the Charterer under the agreement. In fact, the evidence demonstrates that in February of 2009, the respondents attempted to have OSA and Con-Dive execute a Third Amendment that would have this consequence but they did not do so.

[54] The respondents say that, notwithstanding the absence of a written amendment joining OSA as a Charterer, the law supports them in holding OSA liable under the Charter Party as if it had been a signatory. Their position is that the mere assertion that a legal argument exists is sufficient for the purposes of this motion, providing that there is a reasonable factual basis to support the argument.

[55] In their submission the question of whether OSA is bound by the Charter Party is an important legal dispute which I must not determine at this preliminary stage. They argue that they are supported in this by the position taken by the courts in *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp*. and *Young v Tyco International of Canada, supra.*

[56] The respondents say that it is “unnecessary and inappropriate” to “argue the merits of the claim at this preliminary stage”. Nevertheless, they offer that legal authority for attaching the obligations of the Charter Party to OSA can be found in the following passage taken from **A. Swan, *Canadian Contract Law*, 2nd ed.** (Markham, ON: LexisNexis, 2009) where at page 89 the author says:

> To ensure prompt deliveries, a customer of the buyer promises some benefit to the supplier. The customer will be liable for the benefit, even though the supplier does no more than perform the contract that it already had with its buyer. This rule has been accepted for some time. The consideration for the customer’s promise is the supplier’s becoming liable to the customer, as well as the buyer, if it should breach the contract.

[57] In my view, the proposition set out in this passage does not support the proposition that the “customer” replaces the “buyer” in the latter’s contract with

the supplier. Neither does it touch on a circumstance where that contract is in writing and stipulates that it may only be varied upon execution of the written amendment.

[58] The respondent also submits that OSA and Yanez:

> "... were or ought to have been aware that the plaintiffs were proceeding on the basis that OSA had assented to the Charter. OSA and Yanez did nothing to deny this, but rather acted as if and in fact represented to the world that they were bound by the Charter. In such cases, the law is clear that OSA and Yanez should be estopped from now denying their agreement to the Charter: **S.M. Waddams, *The Law of Contracts,* 5th ed.** (Aurora, ON: Canada Law Book, 2005)".

[59] I have been referred to the following passage from Waddams, found at page 66:

> ... if one party is aware of the other's belief in the existence of a contract, and does nothing to deny it, but acts as though there were a contract, that party may be estopped from denying that a contract exists.

[60] Both this and the principle set out in **Swan** may support the existence of a contract as between the plaintiff and the defendant, OSA . They do not address what, on the facts of this case, is in effect a purported novation agreement under

which OSA is to be substituted for Con-Dive as the Charterer or added as another Charterer.

[61] As the respondents' own legal authorities suggest, there may very well be legal arguments upon which OSA could be held liable to the respondents/ plaintiffs on the basis of a separately formed contract containing some or all of the terms of the Charter Party agreement. The Statement of Claim, however, does not plead the existence of a separate contract with OSA and it would take a broader reading of the Statement of Claim than I am prepared to take to conclude that OSA is being called on to defend such a claim.

[62] The respondents suggest that a finding that the court is without jurisdiction, that is based on a finding that OSA is not bound by the Charter Party, is a final decision as to the merits since, as they recognize, the claim is based on OSA being bound by the provisions of the Charter Party. I do not agree with this suggestion.

[63] The evidence presented in this motion was relatively limited as compared to that which may be available to the court in the trial of the action. It may be that a fuller presentation of the evidence will provide a basis in law upon which a court

may conclude that OSA is bound by the terms of the Charter Party. It is not that the plaintiffs cannot ever succeed. The issue is whether the evidence before me provides a reasonable basis in law to conclude that such an argument can succeed.

[64] The respondents also suggest that it is not necessary for the purposes of this motion to determine whether there is a legal basis to find OSA to be bound by the Charter Party. They suggest that at trial OSA will have the opportunity to defend and rebut the plaintiffs' claim that OSA is bound by the Charter Party.

[65] Section 4 (c) of the **CJPTA** sets as a precondition to the existence of "territorial competence in a preceding" that "there is an agreement" between the parties giving jurisdiction to the court. It is true that Clause 31 would provide that jurisdiction but it is entirely dependent upon there being evidence that could reasonably support a conclusion both in fact and in law that OSA was bound by that Clause. As a matter of law, and having regard to the facts, I cannot see a basis upon which OSA can be said to have become a party to the Charter Party in addition to, or in substitution of Con-Dive.

[66] I therefore conclude that section 4 (c) of the **CJPTA** cannot be a basis upon which this court can assume jurisdiction over the preceding as it relates to OSA.

Is there a real and substantial connection between the Province and the facts on which the proceeding against OSA is based?

[67] Section 11 of the **CJPTA** establishes a non-exhaustive list of circumstances in which a "real and substantial connection" may be found.

[68] The respondents submit that OSA is bound by the Charter Party as a matter of law, that the Charter Party expressly states that it is governed by the laws of Nova Scotia and Canadian federal law, and that, therefore, a real and substantial connection is established within the meaning of section 11(e)(ii) of the **CJPTA**. In advancing this argument, the respondents again advocate that the legal dispute as to whether or not OSA was bound by the terms of the Charter Party is a matter to be decided at trial and not on this motion. This is a position which I, respectfully, must disagree with, and for the reasons already set out.

[69] The respondents have not suggested that any other provision of section 11 supports a conclusion that there is a "real and substantial connection" and I find there are none that are applicable to these facts.

[70] However, section 11 expressly provides that the enumerated circumstances are set out therein without limiting the right of the plaintiff to prove other circumstances that establish the requisite connection. The law contemplates that the factors or circumstances which the courts at common-law have taken into account in deciding cases involving assumed jurisdiction are still relevant and must be considered.

[71] Justice Sharpe writing on behalf of the court in *Muscutt v. Courcelles* (2002) 60 O.R. (3d) 20, at paras. 36-37, set out the common-law description of the real and substantial connection test as developed by the Supreme Court of Canada:

> [36] The language that the Supreme Court has used to describe the real and substantial connection test is deliberately general to allow for flexibility in the application of the test. In **Morguard**, at pp. 1104-09 S.C.R., the court variously described a real and substantial connection as a connection "between the *subject-matter of the action* and the territory where the action is brought", "between the jurisdiction and the *wrongdoing*", "between the *damages suffered* and the jurisdiction", "between the *defendant* and the forum province", "with the *transaction or the parties*", and "with the *action*" (emphasis added). In **Tolofson**,

> at p. 1049 S.C.R., the court described a real and substantial connection as "a term not yet fully defined".
>
> [37] In **Hunt**, at p. 325 S.C.R., the court held:
>
> > The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined [in **Morguard**], and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.
>
> The Court also held that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction" and that "the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections".

see also, *Oakley v. Barry* (1998), 166 N.S.R. (2d) 282 (NSCA) and *O'Brien v. Canada (Attorney General)* (2002), 201 N.S.R. (2d)338 (NSCA)

[72] Section 11 of the **CJPTA** does not narrow the parameters of the real and substantial connection test as developed by the Supreme Court of Canada. The common-law treatment of this test was not intended to be changed by the language of the Act. *see, Bouch v Penny, supra.*

[73] Justice Sharpe in **Muscutt** outlined a number of factors that emerge from the case law and that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant. It is clear that no one factor is determinative; rather, all relevant factors should be considered and weighed together.

[74] My consideration of each of these so called *Muscutt* factors, as applied to the facts before me, follows.

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

[75] The key issue in this action is one of contract and in particular whether liability rests with any or all of the defendants for unpaid accounts related to use of the vessel by OSA and ostensibly Con-Dive. The terms of the Charter Party are central to the resolution of that question.

[76] The Charter Party was drafted with the intention that Nova Scotia would be the place to litigate such a dispute. Very substantive parts, if not all, of the

plaintiffs' evidence as it relates to OSA will emanate from key witnesses who are based in Nova Scotia and whose documents, as managers of the Charter Party, are located in Nova Scotia. Email and fax communications were sent from and received in Nova Scotia. There is clearly a connection between the forum and the plaintiffs' claim. The injury to the plaintiffs, i.e., the non payment of accounts, may be reasonably said to have occurred across jurisdictions, including Nova Scotia, where the plaintiffs employed persons charged with managing the Charter Party and arranging for billing and collections of accounts receivable.

(2) The connection between the forum and the defendants.

[77] The defendant Con-Dive is connected to Nova Scotia only insofar as Clause 31 of the Charter Party requires it to respond in Nova Scotia to an action based on the Charter Party. Otherwise, neither it or the co-defendants have a connection to Nova Scotia. While the defendants' contact with the jurisdiction is an important factor, it is not a necessary factor. *see, Muscutt* , at para. 74.

(3) Unfairness to the defendants in assuming jurisdiction.

[78] As frequently noted in the leading cases, the assumption of jurisdiction is ultimately guided by the requirements of order and fairness.

[79] In this matter, Con-Dive is obligated, under clause 31, to respond to the claim in Nova Scotia.

[80] The owner of Con-Dive, Yanez, was integral to the ongoing negotiations with the plaintiffs that kept the vessel operating into March of 2009, allegedly on the strength of his relationship with the plaintiffs and his assurances of payment. If Con-Dive is to defend then one can reasonably infer that Yanez will be a key witness for it and his attendance in Nova Scotia as part of that response is a natural consequence.

[81] Yanez is also named as a defendant in his personal capacity but has not joined OSA in this motion and so is, to this point, defending in Nova Scotia.

[82] So if this motion is granted it would only be OSA that is impacted by this court assuming jurisdiction. OSA submits that it is "manifestly unfair" to require it to defend in Nova Scotia because:

i) it could not have contemplated being called upon to defend in Nova Scotia and so would not have governed its' conduct with Nova Scotia law and procedure in mind;

ii) unanticipated cost and inconvenience will be generated from costs associated with translation of documents and testimony, travel to Nova Scotia for what it says would be in excess of a dozen Mexican based witnesses, and the necessity of retaining an expert to speak on matters of Mexican law;

iii) the existence of a parallel proceeding brought by the plaintiffs against the defendants in the United States, which seeks the same *in personam* relief against OSA.

[83] The costs associated with translation of documents, testimony and travel to a foreign jurisdiction are held in common with the plaintiffs. The evidence of written communications between the parties, that is before me, shows them to all be in the English language, which would need to be translated to Spanish if the

matter goes to a Mexican court, as counsel have suggested it would ultimately. Nevertheless, it is reasonable to believe that each party may want to have the materials translated from Spanish to English or English to Spanish where that is necessary. Wherever the matter is litigated, it will generate these issues and cost consequences. There is a clear cost and inconvenience consequence to OSA if the matter proceeds in Nova Scotia.

[84] I do not agree that OAS could not have contemplated the possibility of defending in Nova Scotia. While the issue of whether it is subject to all of the terms of the Charter Party is a contentious one, OAS would have to have been wilfully blind to this possible consequence given the correspondence exchanged between the parties. It knew that it was dealing with a Nova Scotia based manager of the vessel and that the terms of the Charter Party contained a Nova Scotia forum jurisdiction clause. The terms of the Charter Party, including the calculation of pricing were being followed by Secunda with the full knowledge of OSA and without challenge or complaint. The correspondence makes it clear that the Secunda Marine Services' officials were applying the terms of the Charter throughout. The most definitive notice to OSA is found in the email of Donald MacLeod to Yanez dated March 5, 2009 which includes the following:

> 5) Under reserve of all of our rights at law and under the Charter Party and:
>
> > a) based on your representation that we will receive payment of at least US $2,000,000 once you receive funds related to the Pemex project work involving the Bold Endurance and currently underway which you have also represented would be within your possession within one week from today's date and;
> >
> > b) based on the understanding that Secunda will receive the payment of US $2,000,000 on or before Thursday, March 12, 2009,
>
> we shall withdraw our notice to suspend operations effective today at 1700 hrs. Halifax Time today and shall not suspend operations at that time. We do, however, reserve the right to enforce any and all remedies available to us under the Charter Party at any time.
>
> Our decision not to suspend operations at the close of business today is based on our long-standing relationship over the years and your undertaking to secure the funds necessary to make the US $2,000,000 payment as agreed today.
>
> (emphasis added)

[85] A prudent business person, armed with this information would have considered what this could mean to their interests. The evidence is that OSA took the benefit of this agreement to allow it to continue operations. It cannot now say that it is unfair that the plaintiffs seeks to attach the obligations of the agreement on it.

[86] The action in the United States District Court does generate some concern since the documents before me suggest that it is substantially the same claim, albeit with additional defendants. I am told that the action is still pending.

[87] I note, however, that in his decision, Judge Steele specifically decided that for the purpose of the matter that was before him it was unnecessary and indeed he did not resolve competing arguments as between the plaintiffs and OSA that went to the question of whether OSA could be bound by the terms of the charter party. (*see*, at pp. 6 and 8).

[88] When one considers the issue of fairness to the defendants, it is particularly noteworthy that OSA relied on Canadian maritime law in order to successfully vacate the arrest. I turn now to the decision of Judge Steele, at pp. 12-13:

> The charter party states that it "shall be governed and construed in accordance with the Laws of Nova Scotia and the Federal Laws of Canada." ... The parties agree that, given this provision, the existence of a maritime lien is to be decided under Canadian law (there being no separate Nova Scotian law concerning the creation of maritime liens).
>
> To establish the content of Canadian law, OSA relies on the declaration of a Canadian lawyer and adjunct professor specializing in maritime law. ... According to the declaration, Canadian law does not recognize a maritime lien arising from

> breach of the charter party. Nor, because all such means are legal creations, can a maritime lien arise by agreement of the parties....
>
> ...
>
> Based on the parties' presentations, the court finds and concludes that, under governing Canadian law, the plaintiffs have no maritime lien on the equipment, nor any *prima facie* showing of one. Accordingly, the arrest cannot be sustained.
>
> (emphasis added)

[89] It would appear that OSA relied, and successfully so, on the provisions of clause 31 of the Charter Party in order to set aside the arrest. While it is arguable that OSA is not bound in this jurisdiction by its admission in the US District Court, it is certainly relevant to assessing the fairness of assuming territorial competence by Nova Scotia that OSA previously agreed that the existence of a maritime lien had to be resolved under Canadian law which could only be the case if clause 31 of the Charter Party applied to it.

(4) Unfairness to the plaintiffs in not assuming jurisdiction.

[90] The principles of order and fairness must, of course, be considered in relation to the plaintiffs as well as the defendants.

[91] The evidence on the motion suggests a longstanding and ongoing business relationship with OSA and Yanez. The plaintiffs supported OSA in its representations to the Mexican government when seeking the necessary permits to conduct the contract work using the vessel. It is unclear at what point the plaintiffs learned that OSA represented to the Mexican government that it was the Charterer under the Charter Party, but nothing turns on that fact except to speak perhaps to the business ethics of OAS.

[92] There will be substantial costs to litigate this matter wherever that occurs. To this point, accepting the evidentiary basis of the plaintiff as I have previously allowed, the plaintiffs have a substantial claim against two of the three defendants who are subject to the jurisdiction of Nova Scotia. OSA, Yanez and Con-Dive , though each separate legal persons, are common to all relevant and material aspects of the claim. To parse out the claim on the basis suggested by OSA would be unfair to the plaintiffs.

[93] I have not been presented with evidence of Mexican law that establishes that state is competent to assume territorial jurisdiction. Given that OSA is a Mexican company, with at least some Mexican ownership who were negotiating from

Mexico in securing the services of the vessel to operate in Mexican territorial waters, it may be a reasonable inference that it could, but it is not determinative of the question. If this inference is incorrect then the plaintiffs may be left without a forum in which to prosecute their claim. It would be unsafe to rely on such an inference having regard to the limited evidence available.

[94] This factor weighs in favour of the plaintiffs.

(5) The involvement of other parties to the suit.

[95] In this matter, there are three defendants, two of whom are bound to the proceedings in Nova Scotia under the terms of the Charter Party. The claim against OSA would necessarily involve many, if not all, of the same witnesses and documentary evidence. There is a substantial overlap in the claims against the three defendants.

[96] If the motion is granted, it puts the plaintiffs in the position of having to initiate a separate action as against OSA, and in another jurisdiction.

[97] If this court assumes jurisdiction then the plaintiffs are not subjected to the necessity of pursuing the same claim against associated defendants in two actions conducted in two countries

[98] This factor favors the assumption of jurisdiction in Nova Scotia.

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

[99] None of the parties have adduced evidence that speaks to this factor. **Nova Scotia Civil Procedure Rule** 81 provides a mechanism for the enforcement of foreign judgments in Nova Scotia, but Mexico is not listed as a reciprocating state with Nova Scotia under the Nova Scotia **Reciprocal Enforcement of Judgments Act** R.S. 388 and regulations made thereto. Rule 81.01(2) contemplates the enforcement of non penal civil orders in a manner outside that Act, but in the absence of some further evidence I can reach no conclusion as to the impact that this factor might have on the proceedings.

(7) Whether the case is inter-Provincial or international in nature.

[100] The assumption of jurisdiction is more easily justified in inter-provincial cases than in international ones. However, on the evidence before me, I have no information that assures me that there is a foreign jurisdiction that does have territorial competence over this claim.

[101] Counsel for OSA submits that Mexico is the appropriate forum for adjudication of this dispute.

[102] I have no evidence as to the legal status of this claim if it were to be pursued in Mexico. In the parallel proceeding in Alabama, OSA has not submitted to the US District Court jurisdiction. Judge Steele's decision does not assume that the U.S. court has, or will assume, territorial jurisdiction over the dispute as exists between OSA and the plaintiffs in this dispute. Without evidence to conclude that another jurisdiction will assume territorial competence I am not prepared to say that the international character of aspects of the claim require Nova Scotia to yield jurisdiction.

[103] I conclude that this factor favors an assumption of jurisdiction by Nova Scotia.

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

[104] OSA argues that “... there is nothing to suggest that the jurisdictional standards in OSA’s home jurisdiction (Mexico) are any different from Canada. ... if a Mexican court were to assume jurisdiction over a Nova Scotian with as little connection to Mexico as OSA has to Nova Scotia, it is unlikely that Nova Scotia courts would recognize and enforce any resulting order from the Mexican court.”

[105] This argument is flawed, in that I have no evidence with respect to the jurisdictional standards in Mexico. I have no basis upon which to compare how Mexico’s jurisdictional standards compare with those of Nova Scotia. I am not prepared to speculate on what a Mexican court might find sufficient to assume jurisdiction over a Nova Scotian, or how it might otherwise address the plaintiffs’ claim.

[106] This factor is neutral to the end conclusion.

Conclusion on Territorial Competence

[107] With a mind to achieving fairness and order, I am satisfied that there is a real and substantial connection between this forum and the subject matter of the action and the parties. In considering each of the factors, I find that trying the matter in Nova Scotia is fair to the plaintiff and not unfair to OSA. To grant the motion creates some unfairness to the plaintiffs.

[108] The issues which complicate or increase the costs of litigation in this matter will exist, whether litigated in Nova Scotia or in Mexico.

[109] It is not clear that another jurisdiction has or would assume territorial jurisdiction and there is no basis upon which to conclude that if available it would render Nova Scotia as not competent to assume jurisdiction.

[110] Having regard to the facts as I have found them and the relevant law I conclude that a Nova Scotia court can assume territorial competence.

Having so concluded , should this court decline to exercise 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?

[111] To answer this question the provisions of section 12 (2) of the **Act**, mandates that the court "... consider the circumstances relevant to the proceeding", which consideration must include a series of six specific circumstances set out therein. That list closely resembles the list of common-law factors enumerated in *Muscutt, supra*.

[112] In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897, the Supreme Court of Canada held that the test for ousting a claim on the basis of the *forum non conveniens* doctrine is whether there is another forum that is clearly more appropriate than the forum selected by the plaintiff for the adjudication of the dispute. Accordingly, in a situation where there is no one forum that is clearly the most appropriate, the domestic forum wins out by default and a stay is refused.

[113] In the more recent case of *Teck Cominco Metals Ltd. v. Lloyd's Underwriters,* 2009 SCC 11 the court considered the provisions of the equivalent section in British Columbia (section 11 of the **Court Jurisdiction and Proceedings Transfer Act** S.B.C. 2003, c. 28) to Nova Scotia's section 12. Certain important points were addressed in the case where, as here, a foreign court is proposed as the alternate forum to a Canadian court. The Chief Justice, writing for the court states:

> [21] The CJPTA creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*). It requires that in every case, including cases where a foreign judge has asserted jurisdiction in parallel proceedings, all the relevant factors listed in s. 11 be considered in order to determine if a stay of proceedings is warranted. This includes the desirability of avoiding multiplicity of legal proceedings. But the prior assertion of jurisdiction by a foreign court does not oust the s. 11 inquiry.
>
> [22] Section 11 of the **CJPTA** was intended to codify the *forum non conveniens* test, not to supplement it. The **CJPTA** is the product of the Uniform Law Conference of Canada. In its introductory comments, the Conference identified the main purposes of the proposed Act, which included bringing "Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897" (Uniform Law Conference of Canada — Commercial Law Strategy (loose-leaf), at p. 3). Further, the drafters of the model Act confirmed that s. 11 of the **CJPTA** was intended to codify the common law *forum non conveniens* principles in "comments to section 11":
>
>> 11.1 Section 11 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 11(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 11(2) as relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past. [p. 11]
>
> Section 11 of the **CJPTA** thus constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions.

[114] The court held that even where a foreign court has assumed jurisdiction over a proceeding, that is not an "overriding or determining factor". (at paras 24-29).

[115] The court concluded its' consideration of this aspect of the question by saying:

> [29] Finally, policy considerations do not support making a foreign court's prior assertion of jurisdiction an overriding and determinative factor in the *forum non conveniens* analysis. To adopt this approach would be to encourage a first-to-file system, where each party would rush to commence proceedings in the jurisdiction which it thinks will be most favourable to it and try to delay the proceedings in the other jurisdiction in order to secure a prior assertion in their preferred jurisdiction. Technicalities, such as how long it takes a particular judge to assert jurisdiction, might be determinative of the outcome. In short, considerations that have little or nothing to do with where an action is most conveniently or appropriately heard, would carry the day. Such a result is undesirable and inconsistent with the language and purpose of s. 11, discussed above.
>
> [30] Also, the extent to which approaches to the exercise of jurisdiction differ on an international level also weighs in favour of rejecting Teck's approach. A distinction should be made between situations that involve a uniform and shared approach to the exercise of jurisdiction (e.g. interprovincial conflicts) and those, such as the present, that do not. In the latter, blind acceptance of a foreign court's

> prior assertion of jurisdiction carries with it the risk of declining jurisdiction in favour of a jurisdiction that is not more appropriate. A holistic approach, in which the avoidance of a multiplicity of proceedings is one factor among others to be considered, better serves the purpose of fair resolution of the *forum non conveniens issue* with due comity to foreign courts.

[116] Both parties have advanced their arguments on the basis that the choice of forum is as between Mexico and Canada.

[117] OSA has not agreed to the jurisdiction of the US courts and Con-Dive, the only ostensibly US based party is bound by the choice of forum clause in the Charter Party. Consequently, the position of the parties seems reasonable. On the basis of their position, I will confine my consideration to the two forums.

[118] The burden of proof is on the defendants to establish that Mexico is a clearly more appropriate forum than Nova Scotia.

[119] It is readily apparent that there is significant overlap between the factors to be considered under the declining jurisdiction test and the factors earlier considered under the real and substantial connection test. A notable difference, however, is that under the latter test, it is only necessary to show *a* real and substantial connection, and not *the most* real and substantial connection. In this

second step of the analysis, the task is to determine which jurisdiction has the closest connection with the action and the parties.

[120] I turn now to the six factors enumerated in section 12(2) of the **Act,** and which must be considered in the exercise of the court's discretion whether to decline to exercise its territorial competence.

(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;

[121] The selection of forum will dictate the impact on the convenience and cost to the parties. Neither party appears to have a business presence in the other's jurisdiction and so this factor does not render either jurisdiction more appropriate, just less desirable for the party who must take their witnesses to the jurisdiction of the other. Irrespective of whether the matter is heard in Mexico or in Nova Scotia there will be costs of translation services.

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

[122] There is no evidence on which I could conclude that Mexico is a more appropriate forum, by reason of the law to be applied in the proceeding. If the plaintiffs' argument that OSA is bound to the terms of the Charter Party is ultimately successful, then clause 31 of that agreement makes it clear that the law of Nova Scotia should be applied and thus is the more appropriate forum in which to have 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;

[123] These three factors have overlapping considerations and so I will deal with them together.

[124] If one accepts that it is preferable to avoid a multiplicity of proceedings, then Nova Scotia is the better forum to accomplish this. Clause 31 of the Charter Party

is mandatory, that is, the dispute between the plaintiffs and Con-Dive "... shall be governed and construed in accordance with the Laws of Nova Scotia and the Federal Laws of Canada applicable thereto with any disputes resolved in the Supreme Court of Nova Scotia. ...". The clause does not allow for a discretion to those parties to litigate in Mexico. Therefore, the plaintiffs would be bound to pursue two actions arising largely out of the same fact situation, one in Mexico as against OSA, and the second in Nova Scotia against Con-Dive and Yanez.

[125] The potential for conflicting decisions is increased by the resulting multiplicity of legal proceedings. Common issues to the two actions include the interpretation of the Charter Party, and the respective responsibilities of Con-Dive, OSA and Yanez in fulfilling the Charterer's obligations for payment of hire.

[126] I do not have evidence upon which I can assess whether, or to what extent, the judgment of either jurisdiction would be enforceable in the other.

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

[127] I can find no basis on which to say that Mexico is the more appropriate forum having regard to ensuring the working of the Canadian legal system as a whole.

[128] Issues of assuming territorial competence are contemplated in Nova Scotia legislation which provides a mechanism to ensure that the assumption of jurisdictional competence is undertaken in a fair and orderly manner. It is not uncommon for proceedings to be litigated in Nova Scotia which have an out of jurisdiction component. The plaintiffs' claim, in contract for unpaid debt, is a common legal issue facing the court, and the resources are available to ensure that language differences are not a barrier to a fair and orderly proceeding. There is no unusual feature to this claim that would cause a concern as to the "working of the Canadian legal system as a whole".

[129] Having considered the circumstances relevant to the proceeding, the interests of the parties and the ends of justice, I am not satisfied that Mexico is the more appropriate forum in which to hear this proceeding. Though, not necessary to a

resolution of the question posed by section 12 of the **CJPTA,** I would go further and say that, in my opinion, Nova Scotia is the more appropriate forum.

CONCLUSION

[130] I am satisfied that there is a real and substantial connection between the Province of Nova Scotia, and the facts on which the proceeding against OSA is based. On consideration of evidence before this court and the *Muscutt* factors, so called, I conclude that the court of Nova Scotia has territorial competence in this proceeding.

[131] I am not satisfied that Mexico is a more appropriate forum than Nova Scotia in which to hear this proceeding and having considered the provision of section 12 of the **CJPTA** I am not prepared to decline to exercise the assumption of territorial competence.

[132] The motion of OSA is dismissed. Pursuant to Rule 4.03 I direct that the defendant OSA has 45 days, as defined in Rule 94.02, from the date on which the

Order in this application is dated in which to file a notice of defence, should OSA choose to do so.

[133] I direct that counsel for the Plaintiffs prepare the Order. If the parties are unable to agree as to costs, I will consider their written submissions.

DUNCAN, J.